



**EPA**

**OAR HANDBOOK FOR INTERACTING WITH  
TRIBAL GOVERNMENTS**

**February 2014**

## DISCLAIMER

This handbook is intended solely as guidance for employees of the United States Environmental Protection Agency (EPA), Office of Air and Radiation (OAR). This document is not a regulation and does not create or affect any legal obligations or any right or trust responsibility. This handbook refers to coordination and consultation activities with federally recognized Indian tribes, which OAR undertakes generally, as a matter of policy. This document may be revised as appropriate without consultation or notice.

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## LIST OF ACRONYMS

ADP	ACTION DEVELOPMENT PROCESS
AIEO	AMERICAN INDIAN ENVIRONMENTAL OFFICE
AQAD	AIR QUALITY ASSESSMENT DIVISION
AQPD	AIR QUALITY POLICY DIVISION
BIA	BUREAU OF INDIAN AFFAIRS
CAMD	CLEAN AIR MARKETS DIVISION
CCD	CLIMATE CHANGE DIVISION
CERT	THE COUNCIL OF ENERGY RESOURCE TRIBES
CPPD	CLIMATE PROTECTION PARTNERSHIP DIVISION
CTPG	COMMUNITY AND TRIBAL PROGRAMS GROUP
DERA	DIESEL EMISSIONS REDUCTION ACT
DOI	DEPARTMENT OF THE INTERIOR
EO	EXECUTIVE ORDER
EPA	UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
HEID	HEALTH AND ENVIRONMENTAL IMPACTS DIVISION
ITCA	INTER TRIBAL COUNCIL OF ARIZONA
ITEC	INTER-TRIBAL ENVIRONMENTAL COUNCIL
ITEP	INSTITUTE FOR TRIBAL ENVIRONMENTAL PROFESSIONALS
NAAQS	NATIONAL AMBIENT AIR QUALITY STANDARDS
NCAI	NATIONAL CONGRESS OF AMERICAN INDIANS
NESHAP	NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS
NTAA	NATIONAL TRIBAL AIR ASSOCIATION
NTOC	NATIONAL TRIBAL OPERATIONS COMMITTEE
OAP	OFFICE OF ATMOSPHERIC PROGRAMS
OAQPS	OFFICE OF AIR QUALITY PLANNING AND STANDARDS
OAR	OFFICE OF AIR AND RADIATION
OID	OUTREACH AND INFORMATION DIVISION
OITA	OFFICE OF INTERNATIONAL AND TRIBAL AFFAIRS
OMB	OFFICE OF MANAGEMENT AND BUDGET
ORIA	OFFICE OF RADIATION AND INDOOR AIR
OTAQ	OFFICE OF TRANSPORTATION AND AIR QUALITY
RIC	REGIONAL INDIAN COORDINATOR
RTOC	REGIONAL TRIBAL OPERATIONS COMMITTEE
SPD	STRATOSPHERIC PROTECTION DIVISION
SPPD	SECTOR POLICIES AND PROGRAMS DIVISION
TAC	TRIBAL AIR COORDINATOR
TAMS	TRIBAL AIR MONITORING SUPPORT CENTER
TCA	TRIBAL CONSULTATION ADVISOR
TCOTS	TRIBAL CONSULTATION TRACKING SYSTEM
TEPS	TRIBAL ENVIRONMENTAL PROFESSIONALS

## I. INTRODUCTION

### A. WHY DEVELOP A HANDBOOK FOR TRIBAL INTERACTIONS FOR THE OFFICE OF AIR AND RADIATION?

On November 5, 2009, President Obama signed a Memorandum on Tribal Consultation<sup>1</sup> directing all federal agencies to develop a plan to fully implement Executive Order 13175 (“the Order”).<sup>2</sup> In response, the EPA released its Policy on Consultation and Coordination with Indian Tribes on May 4, 2011 (the “Agency’s Policy”).<sup>3</sup> The Agency’s Policy establishes **broad** standards to determine when the Agency should consult with federally recognized tribal governments based on the Order and the principles expressed in the 1984 EPA Policy for the Administration of Environmental Programs on Indian Reservations (“1984 Indian Policy”).<sup>4</sup>

One of the primary goals of the Agency’s Policy is to fully implement both the Order and the 1984 Indian Policy, with the ultimate goal of strengthening the coordination, consultation, and partnership between tribal governments and the EPA. The most basic result of this full implementation is that the EPA takes an expansive view of the need for **consultation** in line with the 1984 Indian Policy’s directive to consider tribal interests whenever the EPA takes an action that “may affect” tribal interests. The Agency’s Policy is intended to be implemented using existing EPA structures to the extent possible. The use of current EPA business processes, such as the Action Development Process (ADP), National and Regional Tribal Operations Committees (NTOC and RTOC), and tribal partnership groups is purposeful so that consultation with tribal governments becomes a standard EPA practice and not an additional requirement. Under the Agency’s Policy, the EPA program and regional offices have the primary responsibility for consulting with tribes and must ensure their respective consultation plans and practices are in accordance with this Policy.

The OAR Handbook for Interacting with Tribal Governments (referred to as the “Handbook” or “Document”) is designed to **provide specificity and guidance** to OAR staff on how to conduct coordination and government-to-government consultation (“consultation”) with tribal governments under the general umbrella of the Agency’s Policy. This Handbook will assist OAR personnel in reviewing OAR’s actions and/or decisions to determine if they may affect tribal interests and describes OAR’s tribal interactions including coordination with environmental staff and managers, tribal partnership groups (i.e., National Tribal Air Association (NTAA)) and consultation with tribal governments. This Handbook evolved from prior guidance developed and used by OAR’s Office of Air Quality Planning and Standards (OAQPS) dated April 10, 2009.<sup>5</sup> *(For a definition of key terms and concepts within the document, see A-17 in the Appendix.)*

<sup>1</sup> November 5, 2009, Presidential Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation. <http://www.epa.gov/tp/pdf/tribal-consultation-memorandum-09.pdf>

<sup>2</sup> Executive Order 13175 of November 6, 2000, Consultation and Coordination With Indian Tribal Governments. <http://www.epa.gov/tp/pdf/eo-13175.pdf>

<sup>3</sup> EPA Policy on Consultation and Coordination with Indian Tribes. <http://www.epa.gov/tp/pdf/cons-and-coord-with-indian-tribes-policy.pdf>

<sup>4</sup> The 1984 EPA Indian Policy. <http://www.epa.gov/tp/pdf/indian-policy-84.pdf>

<sup>5</sup> The Office of Air Quality Planning and Standards, Consulting with Indian Tribal Governments, dated April 10, 2009. <http://www.epa.gov/air/tribal/pdfs/OAQPSConsultationPolicy%20april%202009.pdf>

Early and meaningful tribal involvement is a cornerstone of the Agency's Policy and Executive Order 13175. The Agency, in keeping with the federal trust responsibility, will ensure that tribal concerns and interests are considered whenever the EPA's actions and/or decisions may affect Indian country or other tribal interests. The EPA's fundamental objective is to protect human health and the environment. This Handbook introduces OAR staff and managers to the basics of coordination with tribes and consultation with American Indian governments within the context of the work performed in OAR. It provides a roadmap for analyzing whether OAR actions and/or decisions may affect tribes and if so, how to proceed. For the purpose of this document, the term **actions and/or decisions** refers to any of the following, non-exclusive list of activity categories that are normally appropriate for consultation if they may affect a tribe(s):

- Regulations or rules.
- Policies, guidance documents, directives.
- Budget and priority planning development.
- Legislative comments.<sup>6</sup>
- Permits.
- Civil enforcement and compliance monitoring actions.<sup>7</sup>
- Response actions and emergency preparedness.<sup>8</sup>
- State or tribal authorizations or delegations.
- EPA activities in implementation of U.S. obligations under an international treaty or agreement.
- Initiation or any significant change of voluntary/partnership programs.

Not all of the activity categories in the Agency's Policy, as listed here, are applicable to OAR actions and/or decisions.

For example, actions and/or decisions developed by OAR may include revisions to existing regulations as set forth by the National Emission Standards for Hazardous Air Pollutants (NESHAP) and the National Ambient Air Quality Standards (NAAQS), and the development or revision of voluntary and partnership non-regulatory programs of plans and guidance. Coordination and consultation on **voluntary/partnership programs** may be appropriate if the Agency's actions and/or decisions may affect tribal interests. For additional guidance on these programs, you should consult with your OAR Tribal Air Program Contact. (*See A-1 in the Appendix.*)

<sup>6</sup> Legislative comments are a special case where, due to short legislative timeframes, consultation in advance of comment submission may not always be possible. Nevertheless, the EPA will strive to inform tribes when it submits legislative comments on activities that may affect Indian country or other tribal governmental interests.

<sup>7</sup> Primary guidance on civil enforcement matters involving tribes can be found in "Guidance on the Enforcement Priorities Outlined in the 1984 Indian Policy" and "Questions and Answers on the Tribal Enforcement Process." This plan is intended to work with the Agency Consultation Policy in a complementary fashion to ensure appropriate consultation with tribes on civil enforcement matters.

<sup>8</sup> The term "response" as defined under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) includes removals and remedial actions.

This Handbook describes the overall process of OAR tribal interactions and includes seven sections:

- **Introduction** – Describes terms and general principles used to better understand the importance of working with tribes.
- **Identification** – Helps to identify effects your action and/or decision may have on tribes or tribal interests.
- **Coordination** – Discusses how to provide information to tribes and, if appropriate, how to ensure their effective input and involvement in the action and/or decision development process.
- **Consultation** – Discusses how to effectively consult with tribe(s) and provide written feedback as to how their input was considered in the final action.
- **Reporting Requirements** – Describes OAR’s reporting requirements under the Agency’s Policy to ensure the EPA’s compliance in implementing Executive Order 13175.<sup>9</sup>
- **Conclusion** – Provides a recap of OAR’s philosophy on coordination/outreach and consultation with tribes.
- **Appendix** – Includes sample consultation letters, key terms and concepts, tribal program contacts, tribal organizations, sample tribal coordination and consultation strategies, tribal effects assessment form, etc.

## B. WHAT ARE THE INTERACTIONS BETWEEN OAR AND TRIBAL GOVERNMENTS?

The interactions between OAR and tribal governments are rooted in and guided by three key concepts: tribal sovereignty, the government-to-government relationship, and the federal trust responsibility to federally recognized tribes.

### *Tribal Sovereignty*

Tribal sovereignty helps us understand *with whom* we are interacting. As sovereign entities, Indian tribes retain sovereign powers over their members and their territory. In light of tribal sovereignty and other principles of federal Indian law, states and local governments are generally precluded from exercising jurisdiction in Indian country.<sup>10</sup> Each tribal government generally sets its own priorities and goals for its membership and territory, including those for environmental protection. Thus, sovereign tribal governments generally have an interest in environmental protection issues, including air quality issues, affecting their members and territory.

Sovereignty means that federally recognized tribal governments can set their own priorities and goals for their membership and territory.

<sup>9</sup> Presidential Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation dated November 5, 2009. <http://www.gpo.gov/fdsys/pkg/DCPD-200900887/pdf/DCPD-200900887.pdf>

<sup>10</sup> Indian country is defined at 18 U.S.C. § 1151 as: “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”



## ***The Government-to-Government Relationship***

The government-to-government relationship helps us understand **how** we are to interact. The EPA recognizes the government-to-government relationship between the United States and federally recognized Indian tribes, and acknowledges Indian tribes as sovereign governments retaining important inherent powers of self-governance. This relationship provides a framework for interacting with tribes as partners to address potential environmental issues of mutual concern. The EPA has significant experience across the Agency working and consulting with tribes on a government-to-government basis.

Federal officials interact with representatives of federally recognized tribal governments.

## ***The Federal Trust Responsibility***

The federal trust responsibility helps us understand **why** we interact with tribes. The federal government has a trust responsibility to federally recognized tribes. Like other federal agencies, the EPA acts in accordance with that trust responsibility, which includes coordinating and consulting with tribes when taking actions or making decisions that may affect tribal interests. In the EPA's landmark 1984 Indian Policy, the Agency stated that the keynote of the EPA's efforts to protect human health and the environment on Indian reservations *"will be to give special consideration to tribal interests in making Agency policy, and to ensure the close involvement of tribal governments in making decisions and managing environmental programs affecting reservation lands."*<sup>11</sup> Similarly in a 1994 memorandum,<sup>12</sup> the President directed all federal agencies to assess the impacts of their plans, projects, programs, and activities on tribal trust resources, to assure that tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities, and to the extent practicable and permitted by law, consult with federally recognized tribal governments before taking actions or making decisions that affect them.

The United States has a trust responsibility to federally recognized tribes that includes the protection of the sovereignty of tribes.

## **C. CONSIDERATIONS FOR EPA INTERACTIONS WITH TRIBES**

Each tribe is unique and differs in leadership, governmental and economic infrastructure, and culture; as a result, no single set of protocols will meet the needs of all tribes. Rather, these are general considerations and guidelines to help staff to approach all tribes with appropriate respect and sincerity. All EPA staff now complete on an annual basis an online course titled, "Working Effectively with Tribal Governments".<sup>13</sup> To further increase awareness and highlight the

<sup>11</sup> EPA Policy for the Administration of Environmental Programs on Indian Reservations, November 8, 1984. <http://www.epa.gov/tp/pdf/indian-policy-84.pdf>

<sup>12</sup> Memorandum: Government-to-Government Relations with Native American Tribal Governments, April 29, 1994 (59 Fed. Reg. 22951). <http://www.fws.gov/policy/library/rg94fr10877.pdf>

<sup>13</sup> Working Effective with Tribal Governments. <https://epa.skillport.com/skillportfe/login.action>

relevance of tribal training for OAR, staff are encouraged to take additional OAR-focused training to gain a better understanding of relevant federal law, Indian programs and government, Indian culture, and how these issues affect our work and interactions with tribes on air issues. OAR plans to provide training on this Handbook to all of its program offices.

Below are key considerations:

- Every tribe is culturally unique. You should be aware of and respect each tribe's cultural concerns.
- The perception of encroachment on tribal sovereignty is one of the most significant issues for tribes today. The issues of tribal treaty rights, resources, and boundaries are particularly important to tribes. Tribes should, as much as possible, be included early in the policy, guidance or rule development process to help ensure their input is meaningful.
- Tribes often have two tiers of government (e.g., legal/political and traditional). The duly appointed tribal leader is not always the decision-maker. You should learn the system of government used by a specific tribe before initiating contact; your OAR Tribal Air Program Contact and the appropriate regional office can assist you with this.<sup>14</sup> (*For OAR Tribal Air Program Contacts, see A-1 in the Appendix.*)
- While environmental issues are of concern to most tribes, they are also concerned with many other issues such as poverty, unemployment, economic development, education and health issues.
- There may be none, only one or a few tribal environmental professionals (TEPs) working on all environmental issues for a tribe. Therefore, any apparent lack of interest in a specific matter may, in reality, result from limited time and resources, and their need to prioritize their environmental concerns. Tribes also tend to approach environmental issues holistically rather than from the media-specific approach that the EPA traditionally takes.
- One size does not fit all. Appropriate consultation may be different for each tribe; it is important that you contact your OAR Tribal Air Program Contact to consider different avenues for reaching out to the tribes.
- Tribes may be skeptical of federal or state governments so they may not be very receptive to you at first. By taking time to inform the tribes appropriately, you will have gone a long way towards building a fruitful, professional relationship. Your OAR Tribal Air Program Contact can help since they have already developed relationships with many tribes.
- Tribes typically are very interested in solving their own problems (related to self-determination and sovereignty) regarding priorities, developing tools and products, etc., that are relevant to their tribe.
- Alaskan Native Villages are unique when compared to most other tribes. They face significant challenges in their relationship with federal agencies, in the structure of their governments and for resources available to them. Additional planning steps may be necessary to address their specific needs.

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<sup>14</sup> Some tribes operate under long standing traditional systems; others operate much like the federal and state systems. Some are made up of elected officials; others are made up of leaders chosen by a clan group or other traditional group of people in the community.

## D. WHAT IS THE DIFFERENCE BETWEEN COORDINATION VERSUS CONSULTATION?

The OAR Handbook describes an overall process that includes two important and distinct types of interactions with tribes: the first is ***coordination*** and the second is ***consultation*** (see *Figure 1*). Coordination is generally conducted with tribal environmental professionals (TEPs) (e.g., tribal air program directors and immediate staff; although other tribal personnel or tribal officials may be involved) in advance of policy, guidance or rulemaking in which we think tribes will have an interest. The purpose of coordination, among other things, is to:

- Assist OAR in assessing whether a particular action or decision may affect tribal interests,
- Involve tribes early in the action and/or decision development process to ensure meaningful tribal input, and
- Assist OAR in determining where consultation with elected or duly appointed tribal leaders may be appropriate.

In contrast, consultations for OAR's efforts are designed to ensure meaningful and timely meetings or discussions with ***elected or duly appointed tribal leaders*** (or their authorized representatives) and the EPA decision-makers as they pertain to OAR actions. Consultation is an opportunity for tribes to interact with the EPA, to discuss the potential effects of planned Agency actions on tribal interests and make recommendations to the Agency. While consultation occurs with tribal leaders (elected or duly appointed) or their authorized representatives, the EPA routinely conducts a wide variety of coordination activities with tribes that include non-elected leaders, environmental professionals, etc. Under the OAR Handbook for Interacting with Tribal Governments, coordination should begin ***early*** in order for the EPA to discuss with tribes the appropriate level of interaction in the action and/or decision development process. If the EPA and the tribe proceed to consultation, this should take place ***prior*** to action proposal. ***After proposal***, the EPA may need to undertake subsequent rounds of consultation if there are significant changes in the originally-proposed activity or as new issues arise.

Coordination is generally always warranted; however, government-to-government consultation may not be appropriate or desired for all activities. For example, if it is determined during the coordination process that an action or decision does not affect tribal concerns or interests, then consultation is not required.

In the OAR Handbook, we have adapted the coordination and consultation process as outlined in the Agency's Policy to better reflect OAR's actions and/or decisions. The focus of OAR's efforts for voluntary programs are on meaningful and timely communications with tribes (e.g., at the TEP level) to increase their awareness and ensure we receive their input as appropriate.

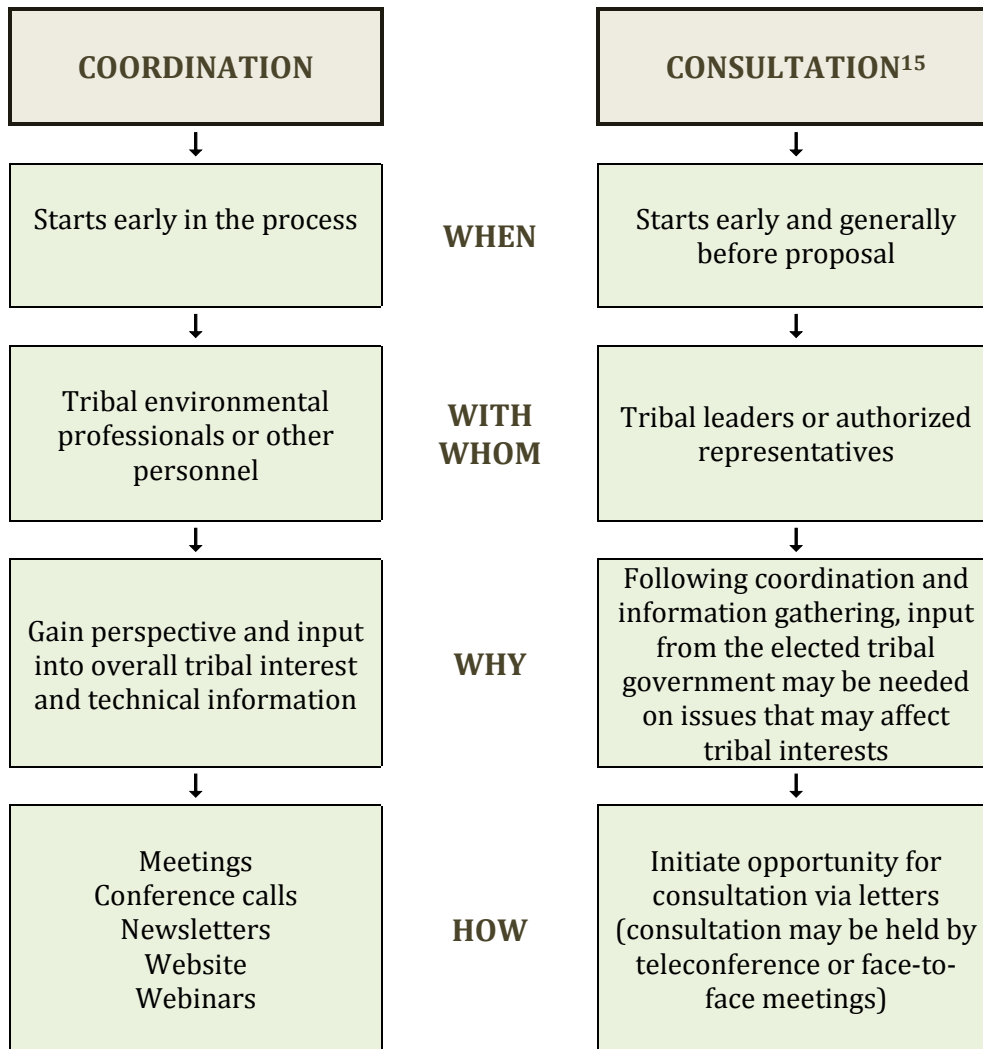


Figure 1: Coordination versus Consultation

## E. WHAT DO OAR TRIBAL INTERACTIONS INCLUDE?

The OAR tribal interactions discussed in this document include all the steps you will need to conduct successful coordination and/or consultation with tribes such as:

- How to identify effects your action and/or decision may have on tribes;
- How to communicate with and provide information to tribes;
- How to involve tribes in the action and/or decision development process; and
- How to effectively consult with tribes.

Although the Agency's Policy serves as the overarching framework for consultation across the EPA, it allows each program office the flexibility to determine the appropriate manner to consult

<sup>15</sup> Each program office has the flexibility to determine the appropriate manner to consult, given the specifics and tribal preferences in each situation as allowed by the EPA Policy on Consultation and Coordination with Indian Tribes dated May 4, 2011. <http://www.epa.gov/tp/pdf/cons-and-coord-with-indian-tribes-policy.pdf>

given the specifics and tribal preferences for each situation. Accordingly, the OAR Handbook has tailored the four phases outlined in the Agency's Policy (Identification, Notification, Input, and Follow-up) to better address OAR tribal interactions for coordination and consultation by combining them into three phases as shown below.

- 1. Identification:** OAR identifies activities that *may* be appropriate for coordination and/or consultation. This phase should include a determination of the complexity of the activity, its potential effects for tribes, and any time and/or resource constraints on coordination and/or consultation activities.
- 2. Coordination:** OAR notifies the tribes of activities that may be appropriate for coordination and/or consultation and provides additional informational/educational opportunities if requested. TEPs may provide input to OAR at this phase for the EPA to consider.
- 3. Consultation:** OAR initiates consultation or tribes officially request consultation and provide input to the EPA on the consultation matter. This phase may include a range of interactions including written and oral communications including exchanges of information, phone calls, meetings, and other appropriate interactions as warranted. OAR may need to undertake subsequent rounds of consultation if there are significant changes in the originally-proposed activity or as new issues arise. As a final step, OAR follows up with feedback to the tribe(s) involved in consultation(s) to explain how their input was considered in the final action. *Note: if consultation is not conducted, then the applicable program office within OAR is not required to follow the procedures pertaining to response letters as described in the Agency's Policy.*

A flow chart outlining these OAR tribal coordination and consultation activities is shown in Figure 2 below. A detailed discussion of the identification, coordination and consultation phases is provided in Sections II – IV of this document.

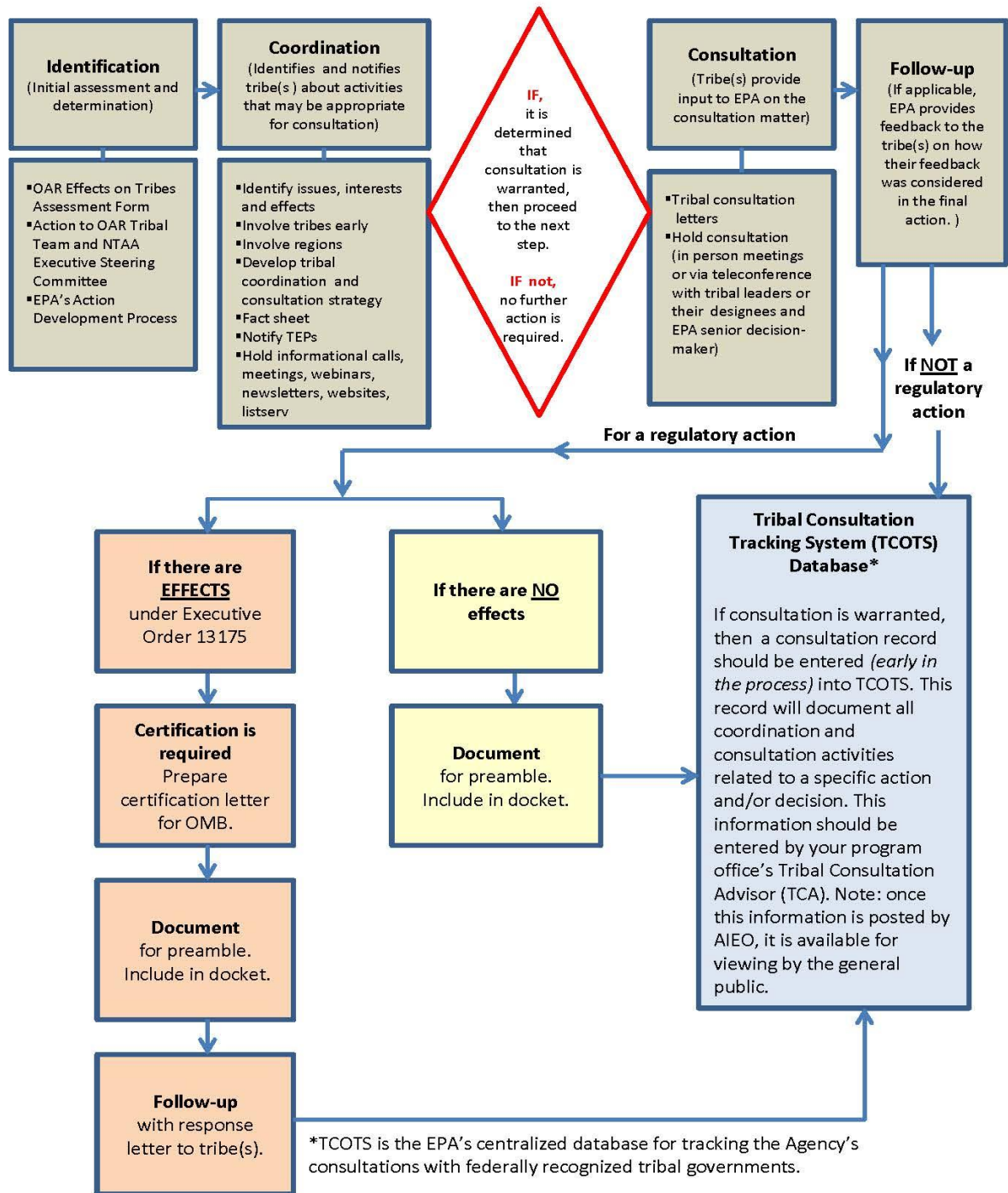


Figure 2: OAR Tribal Consultation and Coordination Activities



## **F. WHAT ARE THE ROLES OF THE OAR TRIBAL AIR PROGRAM CONTACTS?**

The OAR Tribal Program Manager is in the immediate office of the OAR Assistant Administrator and is the primary liaison with the EPA American Indian Environmental Office (AIEO) within the Office of International and Tribal Affairs (OITA). The OAR Tribal Program Manager is the point of contact for each program office within OAR. Each program office – the Office of Air Quality Planning and Standards (OAQPS), Office of Atmospheric Programs (OAP), Office of Radiation and Indoor Air (ORIA), and Office of Transportation and Air Quality (OTAQ) – has a Tribal Air Program Contact that is available to answer questions and provide support for tribal coordination and consultation for program activities and rulemakings. All of the contacts meet regularly as a team to address overarching questions, issues, and concerns. Below is a brief description of the various program roles. *(For a listing of the OAR Tribal Air Program Contacts, see A-1 in the Appendix.)*

### ***OAR Tribal Program Manager***

The OAR Tribal Program Manager is the primary liaison between OAR and AIEO and works directly with the EPA regions and tribal governments on coordinating tribal air quality issues. This role coordinates tribal issues across OAR and deals with budgetary, national grants, program questions and other cross cutting issues.

### ***OAR Tribal Team***

The OAR Tribal Team includes representatives from each of the headquarters air offices and the OAR Tribal Program Manager. The team coordinates with members of the National Tribal Air Association's Executive Steering Committee for input on actions and/or decisions that may affect tribal interests. This team meets regularly to discuss upcoming rulemakings and to help OAR staff prioritize rules for tribal consultation. The team can also help staff identify activities that may affect tribal interests, as well as opportunities for coordination on regulations and voluntary/partnership programs. Talk with your OAR Tribal Air Program Contact for more information. *(For members of the OAR Tribal Team, see A-2 in the Appendix.)*

### ***OAQPS Tribal Program Contacts***

The OAQPS primary contact for all tribal related issues is the Community and Tribal Programs Group (CTPG) located in the Outreach and Information Division (OID). CTPG serves as the OAQPS Tribal Consultation Advisor (TCA) and is the primary liaison between OAR and OAQPS for tribal activities. The TCA and the OAQPS Tribal Consultation Coordinator are responsible for initiating and tracking OAQPS tribal coordination and consultation activities and for providing assistance to the project lead in developing the consultation letter.

The CTPG also oversees the cross-divisional OAQPS tribal workgroup comprised of representatives from each of the five OAQPS divisions: Air Quality Assessment Division (AQAD), Air Quality Policy Division (AQPD), Health and Environmental Impacts Division (HEID), Outreach and Information Division (OID), and Sector Policies and Programs Division (SPPD). This workgroup meets on a monthly basis to review the OAQPS schedules for upcoming activities and/or rulemakings. The OAQPS tribal workgroup also meets to discuss issues and concerns related to implementing OAR's Handbook with respect to tribes across OAQPS divisions. This workgroup can assist in helping to decide the most appropriate method for involving tribes in OAQPS actions and/or decisions. *(For OAQPS tribal program contacts, see A-3 in the Appendix.)*

**OAP Tribal Program Contact**

The OAP Tribal Program Contact serves as the primary liaison between OAP and the rest of OAR and the regions regarding tribal issues. The OAP Tribal Program Contact manages the OAP tribal team which consists of representatives from each of the four OAP divisions: the Clean Air Markets Division (CAMD), the Climate Change Division (CCD), the Climate Protection Partnership Division (CPPD), and the Stratospheric Protection Division (SPD). This team meets monthly to discuss tribal projects, consultation and outreach efforts for both regulations and voluntary/partnership programs, and tribal issues related to OAP activities. The team also works to increase awareness of tribal issues across the office and to identify new opportunities for OAP to support and interact with tribes. *(For OAP tribal program contacts, see A-4 in the Appendix.)*

**ORIA Contact**

The ORIA Senior Tribal Advisor is the primary contact for all tribal indoor air and radiation issues and leads the ORIA tribal team, which includes representation from ORIA divisions, Tribal Air Monitoring Support (TAMS) Center, and regional indoor air and radiation representatives. The ORIA tribal team serves as a means for coordinating and communicating ORIA related activities and information of interest to tribes. *(For ORIA tribal program contacts, see A-5 in the Appendix.)*

**OTAQ Contact**

OTAQ's Tribal Advisor is the primary contact for all tribal matters associated with mobile source issues and leads the OTAQ's tribal outreach efforts, which currently include the Diesel Emissions Reduction Act (DERA) National Funding Assistance Program's Tribal Competition. In addition to supporting OTAQ's communication with the tribes, the OTAQ Tribal Advisor coordinates and communicates OTAQ related activities and information of interest to tribes. *(For OTAQ tribal program contact, see A-2 in the Appendix.)*

## II. IDENTIFICATION

### A. INTRODUCTION

The identification phase is designed to help assess whether an Agency action and/or decision may affect tribal interests. This phase should include a determination of the complexity of the activity, its potential effects on tribes, and time and/or resource constraints relevant to consultation and coordination activities. In this Handbook, we will use the key term effects that reflects the principles expressed in the 1984 EPA Policy for the Administration of Environmental Programs on Indian Reservations (1984 Indian Policy) for interacting with tribes. The 1984 Indian Policy remains the cornerstone for the EPA's Indian program and "assure[s] that tribal concerns and interests are considered whenever the EPA's actions and/or decisions may affect tribes (1984 Policy, p.3, principle no.5). *(For a definition of effects, see IV. Consultation.)*

If a determination is made that an action and/or decision may have tribal effects, then consultation may be required and additional steps must be followed as directed in the Agency's Policy *(see Section IV. Consultation)*. Actions and/or decisions that potentially require consultation may be those that:



- Impose substantial direct compliance costs on Indian tribal governments;
- Affects the relationship between the federal government and Indian tribes; or
- Affects the distribution of power and responsibilities between the federal government and Indian tribes.

Furthermore, consultation may be required if an action or decision has effects on tribal natural resources; tribal culture on the reservations; trust lands or other lands; and treaty rights applicable to lands outside reservation boundaries. It is important to recognize that tribes have many interests including human health, ecological, cultural, economic, and/or social impacts.

Coordination with tribes should be considered for all actions and/or decisions to help identify if tribal interests are affected. For example, if an action or decision regulating a facility on a tribal reservation, which is not owned by the tribe, but which contributes to the revenues of the tribe and employs tribal members, consultation is recommended since there is a potential for an indirect effect on the tribe's revenues and general economy including employment.

## B. HOW TO DETERMINE IF AN ACTION AND/OR DECISION MAY AFFECT TRIBAL INTERESTS

### *Assessment*

The OAR assessment of potential effects on tribes is a process that helps to determine whether an OAR rule, action and/or decision, or voluntary/partnership program could potentially affect tribal interests (*see Figure 3 below*). To initiate the assessment process, the project lead may use the **OAR Effects on Tribes Assessment Form** ("Assessment Form") or *equivalent documentation* for ascertaining whether the activity may have an effect on a tribe(s) or tribal interests. (*For a copy of this form, see A-8 in the Appendix.*)

In conducting the assessment process, some of the questions will be answerable without significant data research or development. Other considerations will require analysis of EPA data to determine whether there is a potential to affect tribal interests. Based on your review of these considerations, if the answer is **YES** to any of the questions in Figure 3, then your action and/or decision may affect tribes. Government-to-government consultation with the potentially affected tribal officials may be warranted along with coordination and a **Tribal Coordination and Consultation Strategy** ("Strategy") should be developed (*see pg. 19*). Even if the answer is clearly **NO** to all of the questions, some form of coordination may be recommended, based on other Agency policies such as the EPA's 1984 Indian Policy. It is recommended that the OAR Tribal Team review the completed Assessment Form or equivalent documentation in order to evaluate the analysis and to determine whether tribes or tribal interests may be affected. This team is available as a resource to OAR staff to help prioritize Agency actions and/or decisions for tribal consultation and can help staff identify potential effects on tribal interests. (*Contact your tribal program contact if assistance is needed.*)

Staff should document all assessments, coordination, and other interactions with tribes throughout the tribal interactions process. Some of this documentation (i.e., a summary of coordination and consultation events) may be submitted to the Office of Management and Budget (OMB) as part of the rulemaking process.

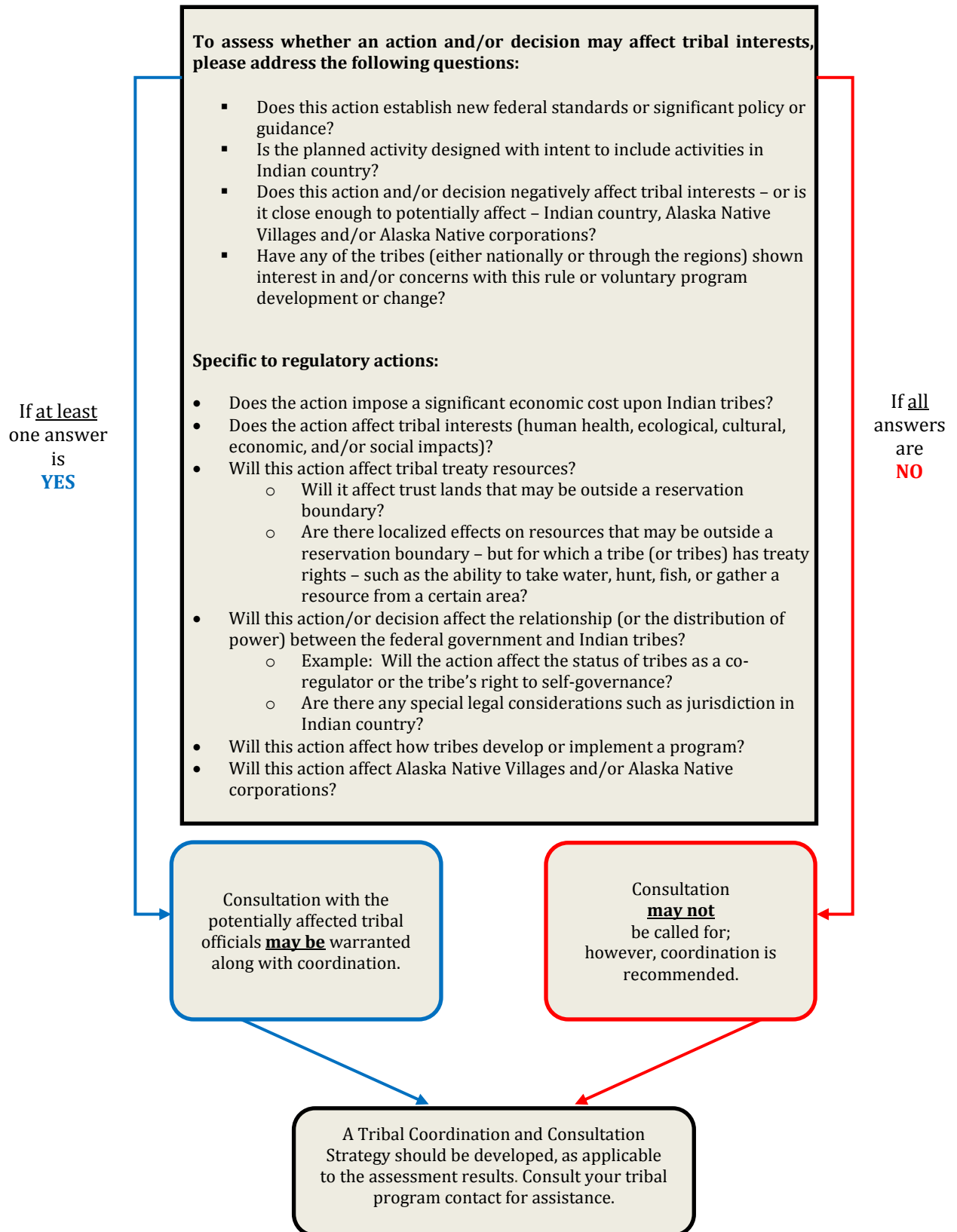


Figure 3: OAR Assessment of Potential Effects on Tribes

### ***Tribal Coordination and Consultation Strategy (“Strategy”)***

After completing the OAR Effects on Tribes Assessment Form, the ***project lead*** should develop a Tribal Coordination and Consultation Strategy (“Strategy”) to provide a framework for the coordination and consultation process, the scope of which should be applicable to the assessment results. Sections III and IV discuss the general recommendations and steps for conducting effective coordination and consultation and should be considered in

Tribes may request consultation (and/or coordination) on actions that we think will not affect tribal interests. According to the EPA Policy on Consultation and Coordination with Indian Tribes dated May 4, 2011, “Tribal officials may request consultation in addition to EPA’s ability to determine what requires consultation. The EPA attempts to honor the tribal government’s request with consideration of the nature of the activity, past consultation efforts, available resources, timing considerations, and all other relevant factors.”

the development and implementation of the Strategy. This Strategy will also help in documenting the process, particularly if the action is determined to have substantial direct effects on tribal interests and will need to be certified as having met all of the Executive Order 13175 requirements later in the process. The OAR Tribal Air Program Contact can provide assistance with the process. *(For examples of Strategies for both regulations and voluntary/partnership programs, see A-9 and A-10 in the Appendix.)*

The OAR Tribal Team is also available to assist you with the development of your Strategy. Your OAR Tribal Air Program Contact should reach out to the OAR Tribal Team during the appropriate phase of your activity as outlined in Section III. Coordination. *(For a listing of OAR Tribal Air Program Contacts and for members of the OAR Tribal Team, see A-1 and A-2, respectively, in the Appendix.)*

### **C. FOLLOWING THE AGENCY’S ACTION DEVELOPMENT PROCESS FOR RULEMAKINGS**

Regulatory actions are tiered as soon as a program office knows that it may need to develop some type of action on an issue, or as early in the process as possible. For those rules that have been designated as either Tier 1 or Tier 2 under the Agency’s Action Development Process (ADP), there is a flow diagram to assist you through the process *(see A-7 in the Appendix)*.<sup>16</sup> The chart depicts the Agency’s official action development process; however, we have added boxes, designated in **red**, to show when tribal considerations should be incorporated into the Agency’s official process. This diagram is not intended to amend or alter the Agency’s official ADP, but rather to provide additional information to assist in the consideration of effects on, and coordination with, tribes ***in the context of relevant OAR actions***.

<sup>16</sup> Additional information on Tier 1: “Administrator’s Priority Actions,” Tier 2: “Cross-Media and/or Actions with Significant Issues,” and Tier 3: “Lead Office Delegation” can be found at: <http://intranet.epa.gov/actiondp/>

### III. COORDINATION

#### A. WHAT IS COORDINATION?

Coordination is an opportunity for the EPA to notify and begin interactions with tribes about activities that may be appropriate for consultation. Coordination should begin *early in the process* to allow for meaningful input by the tribe(s) on actions and/or decisions that may have effects on tribe(s) or tribal interests. Moreover, early coordination provides tribal staff the opportunity to assess the need for consultation with the EPA. The EPA staff should begin the coordination process for:

- ***Rulemakings*** – between Preliminary Analytic Blueprint and Early Guidance for ADP Tier 1 or 2 actions, and as the workgroup prepares its outreach and stakeholder involvement plans (prior to management guidance for Tier 3 rules).
- ***New or updated voluntary/partnership programs*** – during the development phase.
- ***Existing voluntary/partnership programs*** – at any time to help initiate or refine tribal outreach.

Coordination activities can be tailored to the specific needs of the action and/or decision, ranging from notification to the tribes via a listserv or electronic mailing, to establishing a formal work group, to participating on conference calls with tribal organizations (i.e., National Tribal Air Association). *(The tribal contact within your program office can help you design the appropriate scope of interaction.)*

Coordination should be considered for all actions, regardless of whether the actions have been determined to have effects on tribal interests and independent of the determination that consultation is warranted.

#### B. GENERAL RECOMMENDATIONS FOR COORDINATION

- **Identify Issues, Interests and Effects**
  - What are the issues?
  - What are the critical time lines and events?
  - Who is involved?
  - Who has an interest?
  - Who is potentially affected?
  - What are the potential effects?
  - Where are the effects occurring?

- **Involve Tribes Early in the Coordination Process**
  - The earlier the better, *preferably prior to proposal*.
  - Work with your tribal program contact to carefully set up work groups to ensure needed expertise.<sup>17</sup>
  - Coordination schedules should reflect critical and appropriate points for interaction.
  - Allow for a full range of opinions and interactions.
- **Plan Strategies and Mechanisms**
  - Consider strategies about appropriate audience, method of communication, and content.
- **Involve the EPA Regional Offices**
  - Regional tribal and program offices should be actively involved in identifying and working with tribal officials and personnel from their regions. One way to raise issues quickly is to work with the sub-lead region for tribal air issues and schedule time on one of the monthly Tribal Air Coordinator (TAC) calls. (*Work with your OAR Tribal Air Program Contact to coordinate.*)
- **Involve other Federal Agencies**
  - Where national rulemakings or voluntary programs involve other federal agencies, OAR will strive to work collaboratively across agencies on coordination and consultation activities. (*Work with your OAR Tribal Air Program Contact to determine where this may be appropriate.*)
- **Document the Entire Coordination Process**
  - Assessments.
  - Participation on tribal calls or meetings.
  - Interactions with tribes.
  - Coordination efforts.
  - Written communications to and from tribes.
  - Follow-up.

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<sup>17</sup> Meetings with outside organizations may be subjected to the Federal Advisory Committee Act (FACA). Consult with your Office of General Counsel (OGC) to determine whether FACA applies to your meeting.

## C. PROCESS FOR CONDUCTING EFFECTIVE COORDINATION

### ▪ Write a fact sheet for tribes in plain English

*(For examples, see A-11 in the Appendix.)*

- a. Describe the action and/or decision being considered (i.e., policy, guidance, rulemaking, partnership, or voluntary program).
- b. Describe how the action and/or decision may involve or affect tribes.
- c. Include the project lead's contact information.

### ▪ Identify which tribes may be affected

- a. Initiate discussions with the tribal program contact; they can help work with the NTAA Executive Steering Committee and appropriate EPA regional office TACs.
- b. Work with the OAR Tribal Air Program Contact to provide an overview of the activity on the next NTAA call.
- c. Work through the OAR Tribal Air Program Contact to set up follow-up informational meetings or discussions with interested tribal environmental staff.
- d. Work with the OAR Tribal Air Program Contact to identify the type of tribal government<sup>18</sup> and appropriate tribal contacts.
- e. Initiate discussions with the OAR Tribal Air Program Contact to identify special tribal considerations and protocols (e.g., subsistence seasons) for those tribes.  
*(For a listing of tribal program contacts, see A-1 through A-5 in the Appendix.)*

#### **Actions may have obvious or not so obvious effects on tribes. For example:**

- Mercury and Air Toxics Standards (MATS) Rule
  - Compliance costs may impact costs of water delivery for some tribes.
  - May impact tribal revenues from coal mining operations.
  - Mercury deposition from coal-fired EGUs may have environmental, health and economic impacts (i.e., elevated mercury levels in subsistence fish).
- Tribal Minor New Source Review (NSR) Rule
  - May level economic playing field, by filling regulatory gaps.
  - May protect tribal sovereignty from state incursion by clarifying jurisdiction in air permitting.
  - May provide equal opportunity for economic development and controlled growth for new sources in Indian country.

### ▪ Notify tribal environmental professionals

- a. Work with the OAR Tribal Air Program Contact, Tribal Air Coordinators (TACs), and NTAA to identify where tribe(s) is/are located to develop a coordination/communication strategy.
- b. Notify all affected tribal governments at an early stage by disseminating information to tribal officials and TEPs on action and/or decision development. In addition to sending out the fact sheet described above, a message can also be sent out on the Tribal Air Listserv or Tribal Air Website with the EPA project lead's contact

<sup>18</sup> Some tribes operate under long standing traditional systems; others operate much like the federal and state systems. Some are made up of elected officials; others are made up of leaders chosen by a clan group or other traditional group of people in the community.

information; participate in the NTAA/EPA monthly calls; work with the EPA regional office tribal air contacts (TACs and other regional staff); and send information to the National and Regional Tribal Operations Committee (NTOC and RTOC) contacts. There may be other important tribal organizations that can help in getting the word out to the tribes depending on the issue. For example, the Consortium of Energy Tribes (CERT) would be important to include on oil and gas development issues. *(For a listing of relevant tribal and EPA organizations, see A-18 in the Appendix.)*

▪ **Potential activities for conducting coordination**

- a. Distribution of fact sheet and other written information on proposed action(s) to tribal community.
- b. Participation on tribal community organization calls (i.e., NTAA, RTOC, etc.).
- c. Webinars.
- d. Technical meetings.
- e. Informational calls.
- f. EPA Tribal Air Newsletter.
- g. EPA Tribal Air Website (<http://www.epa.gov/air/tribal>).
- h. EPA Tribal Air Listservs.

## IV. CONSULTATION

The EPA ensures the close involvement of tribal governments and gives special consideration to their interests whenever the EPA's actions and/or decisions may affect tribes or tribal interests. Consultation is a deliberative process that endeavors to achieve effective collaboration and knowledgeable decision-making. Consultation does not begin or end with the EPA simply providing information to tribes, but is built upon a government-to-government exchange of information and ideas. For OAR's purpose, consultation is meaningful communication that may involve meetings or discussions with *elected or duly appointed tribal leaders* or their authorized representatives to interact with EPA decision-makers about a potential action and/or decision, potential effects on tribes, and options to take such effects into account. Consultation should occur early enough to allow tribes the opportunity to provide meaningful input that can be considered prior to EPA decision-making.

### A. WHEN IS CONSULTATION REQUIRED?

**Consultation** is required for any policy, guidance, rule or other action and/or decision that is:

- 1) Targeted directly toward tribes;
- 2) Has effects on tribes or Indian country; or
- 3) Has broad tribal interests.

Interactions between the EPA decision-makers and tribal leaders may be a lengthy process.

For example, tribal environmental professionals (TEPs) may need time to review and bring issues before their tribal leadership and there may be delays due to potential staffing constraints, and resources or cultural considerations.

It is important when scheduling activities (i.e., conference calls, webinars, informational meetings, etc.) to provide tribes ample lead time for their "internal" communication/notification process.



Remember that consultation is with an elected tribal official or their designee and a senior agency decision-maker (division director or higher ranking manager). The EPA's actions and/or decisions *affect tribal interests* when they meet, at least, one of the following criteria:

- 1) They impose substantial direct effects on one or more Indian tribes;
- 2) Affect the relationship between the federal government and Indian tribes; and
- 3) Affect the distribution of power and responsibilities between the federal government and Indian tribes.

Additionally, the EPA's actions and/or decisions may have an effect on tribal natural resources, including the culture on the reservations, on trust lands or other lands and effects on treaty rights applicable to lands outside reservation boundaries. It is important to recognize that tribes have many interests including human health, ecological, cultural, economic, and/or social impacts when considering whether an EPA action and/or decision may affect tribal interests.

*Consultation on voluntary/partnership programs* may be necessary if there are potential effects on tribes. For additional guidance on these programs, you should consult with your OAR Tribal Air Program Contact.

## B. STEPS TO EFFECTIVE CONSULTATION

As discussed earlier, coordination involves working with TEPs to assess whether consultation will be useful in advance of any action and/or decision for which OAR thinks tribes may have an interest. If the results of OAR's assessment of effects on tribes, and/or interactions with TEPs during coordination, determine that the action and/or decision may affect tribes or tribal interests, the OAR program office should initiate consultation.<sup>19</sup> Consultation also may be initiated upon the request of one or more tribes.

Consultation is initiated by sending a letter from an EPA decision-maker (division level or higher ranking manager) to tribal leaders of potentially affected federally recognized tribes, providing an overview of the action and/or decision, and offering an opportunity for consultation *on a specific rule, action and/or decision*.

During the consultation meeting, it is important to document all information which *may* include:

- A list of the participating tribe(s) and elected tribal leader(s) or their authorized representative,
- Underlying agency action which is the subject of the consultation, and
- The views and concerns expressed by the tribe(s).

It is important to promote a full and frank exchange of views during government-to-government consultation with tribes. These interactions may include discussions relating to issues of unique sensitivity to tribes such as cultural practices, uses of environmental resources, and locations of cultural resources. There may also be sensitivity regarding tribal relationships with surrounding states and jurisdictional issues.

<sup>19</sup> If the OAR Assistant Administrator (AA) has worked with the TCA to determine whether or not tribal interests may be affected, then the decision as to whether or not to consult rests with the AA.



Documenting meeting notes ensures that participants can later review and correct any inaccuracies, and also provides the Agency with a solid consultation record. In addition, this documentation will assist the project lead with the discussion section of their rule preamble or document in the background/summary: the coordination and consultation activities, tribal concerns, and how these concerns were addressed.

After finalizing the action and/or decision and *if consultation was conducted*, the project lead should develop a response letter to the tribal leadership involved. The EPA response letter should explain how the tribe(s) input was considered in the final action and how their comments and/or concerns were addressed. (*For an example of a response letter, see A-16 in the Appendix.*)

### The Steps to Consultation:

#### 1. Plan and document consultation activities:

- a. Document all consultation activities (i.e., conference calls, on-site meetings, written communications to and from tribes, and any other pertinent information).

#### 2. Determine if the action and/or decision may affect tribes:

- a. Under the Agency's Policy, actions and/or decisions may have effects on: tribal natural resources, culture on the reservations, trust lands or other lands, and treaty rights applicable to lands outside reservation boundaries. It is important to recognize that tribes have many interests including human health, ecological, cultural, economic, and/or social impacts.
- b. Executive Order 13175 is triggered and certification is required when an action and/or decision has implications that: "impose substantial direct effects on one or more Indian tribes, or affects the relationship between the federal government and Indian tribes, or affects the distribution of power and responsibilities between the federal government and Indian tribes."<sup>20</sup> (*For additional information, see IV.C. Consultation.*)
- c. OAR Program and EPA regional offices should work together in the development of consultation strategies in situations where consultations on national activities are carried out or executed by the regions.<sup>21</sup> (*See your OAR Tribal Air Program Contact for assistance.*)
- d. When OAR national rulemakings involve other federal agencies, OAR strives to carry out its consultation activities jointly with those agencies, where appropriate. (*See your OAR Tribal Air Program Contact for assistance.*)

<sup>20</sup> <http://www.epa.gov/tp/pdf/eo-13175.pdf>: "Policies that have tribal implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

<sup>21</sup> Generally, when an action originates in a region, the region will be responsible for leading and executing all aspects of consultation. In some circumstances, program offices and regions may want to co-lead a consultation effort, or by mutual agreement they may determine that it is more effective for the program office to lead a consultation effort even though the action originates in a region.

**3. Initiate consultation:**

- a. If it is determined that the action and/or decision may affect tribes or tribal interests, then the project lead should take the following actions to initiate consultation.

1. Prepare consultation letters addressed to tribal leadership of the potentially affected federally recognized tribes with the opportunity for consultation. The letter should include an overview of the specific rule, action and/or decision, and the date by which tribes may notify the EPA of their consultation request.

The tribal response date should be at least 4 weeks from the date of the signed "invitation to consult" letter. This provides tribal leadership with the time to review and decide their action/response on a particular issue.

*(For examples, see A-12 in the Appendix.)*

- b. Once the project lead has drafted the consultation letter, an electronic copy of the "draft" letter should be submitted to the applicable OAR program office tribal contact for review. After internal review, the OAR program office tribal contact will return the draft letter to the project lead with comments and recommendations. The "final" letter should be signed by an EPA official (division director level or higher ranking manager).

- c. Send official offer for consultation to tribes. For all OAR program offices, the OAQPS Tribal Consultation Coordinator is available *(if needed)* to assist with the setup of mail merge files for consultation letters. *(For contact information, see A-3 in the Appendix.)*

#### **An Example of the OAQPS Process for Initiating Consultation Letters**

1. The project lead should submit the "final" letter, in electronic format, to the OAQPS Tribal Consultation Coordinator for handling. *(For contact information, see A-3 in the Appendix.)*
  - a) Prepare the letter in a "Word" document to ensure mail merge functionality. The letter should not be submitted on letterhead or in a PDF file.
  - b) Send a scanned copy (PDF file) of the EPA official's signature (division director or higher ranking manager) for electronic insertion into the letter; otherwise each letter will need to be manually signed.
  - c) The OAQPS Tribal Consultation Coordinator will return "hard copy" letters or a "print-ready" file to the "originating" office for final printing and/or mail out.
  - d) The OAQPS Tribal Consultation Coordinator will also provide a courtesy copy (via email) to the TEPs.

**4. Conduct informational meetings with the TEPs:**

- a. After the consultation letter has been sent and *before* the tribal response date provided in the consultation letter, the project lead, with assistance from their OAR Tribal Air Program Contact will continue with the information sharing process by coordinating one or more informational meetings with tribal leaders and/or their environmental staff.
  1. *Please note* –it is important to recognize that many tribal environmental professionals (TEPs) are precluded from participating in any meeting termed consultation which does not include their tribal leadership.
  2. The purpose of these informational meetings is to provide a general overview of the proposed action and/or decision so that the TEPs may assist their tribal leadership in determining whether to participate in consultation.
- b. At least one week prior to the scheduled informational meeting, the project lead should provide their OAR Tribal Air Program Contact with a copy of the PowerPoint presentation on the proposed action and/or decision.
  1. The OAR Tribal Air Program Contact will review this presentation and provide comments as necessary. Either the project lead or their tribal program contact will distribute the final presentation to the participating tribes, at a minimum of two days, prior to the scheduled meeting.
- c. Document all meetings and note who attended, what topics were discussed, and any other relevant information, and include all written materials and presentations.

**5. Conduct consultation with tribal leadership or their designee:**

- a. If a tribe expresses interest in consultation, then the project lead and their OAR Tribal Air Program Contact should coordinate consultation meetings with tribal and EPA leadership. These meetings might be held either by teleconference or in person. The meeting might be with an individual tribe or a joint meeting of several tribes, if they agree.
- b. The meeting should be attended by a senior agency official (generally the division director or higher ranking manager).
- c. When OAR national rulemakings involve other federal agencies, OAR strives to carry out its consultation activities jointly with those agencies, where appropriate. (*See your OAR Tribal Air Program Contact for assistance.*)
- d. OAR program and EPA regional offices should actively work together in the development of consultation strategies in situations where consultations on national activities are carried out or executed by the regions. (*See your OAR Tribal Air Program Contact for assistance.*)

- e. When consultation is scheduled, the project lead should provide appropriate information to their OAR Tribal Air Program Contact and Tribal Consultation Advisor (TCA) for submission into the Tribal Consultation Tracking System (TCOTS). *(For a listing of OAR TCAs, see A-6 in the Appendix.)*
  - f. Document all meetings and note who attended, and what topics were discussed and any other relevant information.
- TCOTS is the EPA's centralized database for tracking consultations with federally recognized tribal governments.**

  1. The data collected are used to support internal and external reporting, and to disseminate specific information pulled from the system for external public viewing via the EPA's Tribal Portal. (<http://tcots.epa.gov/oita/TConsultation.nsf/TC?OpenView>)
  2. The tribal community is able to view notifications of upcoming rulemakings or actions and/or decisions requiring tribal consultation and any supporting documentation that may be available (i.e., consultation letters, presentations, webinars, etc.).
6. **Complete additional documentation if the rule is covered by the Executive Order 13175:<sup>22</sup>**
    - a. Write a summary of all tribal coordination efforts, including who attended, topics of discussion, any other pertinent information, and submit this to the rule docket.
    - b. Write a tribal impact summary statement which includes information and comments submitted by the tribes, and
    - c. Draft a certification request memorandum from the OAR Assistant Administrator to the OITA Assistant Administrator. *(See Section IV. Consultation, for instructions on developing this memorandum and on the timing and submittal process.)*
      1. After receipt, review and approval, OITA will send a memo back to OAR indicating that all consultation requirements have been met.
      2. Submit the OITA certification memo with the tribal impact summary statement to the Office of Management and Budget (OMB) with the rule package.
  7. **Complete other documentation requirements, as needed:**
    - a. Briefly discuss in the relevant section of the rule preamble or document in background/summary: the coordination and consultation activities, tribal concerns, and how these concerns were addressed.
    - b. Ensure that all information is submitted to the docket for proper recordkeeping.

<sup>22</sup> Executive Order 13175 of November 6, 2000, Consultation and Coordination with Indian Tribal Governments. <http://www.epa.gov/tp/pdf/eo-13175.pdf>. "Policies that have tribal implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

**8. Follow-up with the tribe(s):**

- a. After finalizing the rule and if consultation was conducted, the project lead should develop a response letter to the tribal leadership involved.
  1. The EPA response letter should explain how the tribe(s) input was considered in the final action and how each of their comments and/or concerns was addressed. *(For an example letter, see A-16 in the Appendix.)*
  2. The letter should be signed by the highest level EPA official involved and sent to the most senior tribal official involved in the consultation.

**Note:** *If consultation is not conducted, the OAR program office is not required to follow the procedures pertaining to response letters as described in the Agency's Policy.*

**C. EXECUTIVE ORDER 13175 CERTIFICATION (IF APPLICABLE)**

If an action and/or decision is determined to have substantial direct effects on one or more Indian tribes as defined under Executive Order 13175<sup>23</sup> then, the Executive Order directs the Agency “to include a certification...that the requirements of this order have been met in a meaningful and timely manner” when “transmitting any draft final regulation that has tribal implication to OMB...”

If certification is required, OAR submits a memorandum to the Office of International and Tribal Affairs (OITA) requesting concurrence on consultation activities *(for an example, see A-13 in the Appendix)*. This memorandum should be submitted to the OITA **at least 10 days** prior to the action being sent to OMB. In return, the OITA will provide a certification memorandum stating that the action complies with the Executive Order requirements *(for an example, see A-14 in the Appendix)*. This certification memorandum from OITA should be submitted to OMB with the final action.

***Preparing a Certification Request Memorandum to OITA***

The project lead should coordinate with their OAR Tribal Air Program Contact regarding the drafting of the certification request memorandum. The certification request is from the Assistant Administrator of the Office of Air and Radiation (OAR) to the Assistant Administrator of the Office of International and Tribal Affairs (OITA). The certification request memorandum should contain, at a minimum, the following:

1. A description of the extent of the coordination and consultation activities;
2. A summary of tribal officials' concerns;
3. The EPA's position regarding the action;
4. A statement of the extent to which the tribal official's concerns have been met; and
5. Any supplemental materials to assist OITA in certifying to OMB.

<sup>23</sup> <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2010/m10-33.pdf>: Under Executive Order 13175, “Policies that have tribal implications” refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.”

**To simplify the process, it is suggested that the language from the rule preamble be used to describe the coordination and consultation activities.** To assist in developing this certification request memorandum, as well as the language to be used in the preamble, examples from actual projects have been included in the Appendix (*see A-15*).

## V. REPORTING REQUIREMENTS

Each OAR program office must develop a semi-annual agenda and submit the agenda or an update to AIEO (through TCOTs) by October 1<sup>st</sup> and April 1<sup>st</sup> of each year. The semi-annual agenda consists of a list of pre-identified activities that each program office plans to consult upon within a specified six month period. Program offices are also responsible for submitting brief summaries of completed consultations to AIEO no later than June 1<sup>st</sup> of each year. It is recommended that the summaries be completed as soon as practicable once consultation is complete. This information is compiled and submitted to the OAR Program Manager, through TCOTS, by the Tribal Consultation Advisor (TCA) within your program office. (*See Appendix A-6, for OAR Tribal Consultation Advisors.*)

Executive Order 13175 directs federal agencies to submit to OMB annually, certification from the official designated to ensure compliance with this order, that all relevant requirements of the Executive Order have been met.<sup>24</sup> As such, using the information provided in TCOTs, the Agency's Designated Consultation Official (AA in OITA) will submit the Agency's annual consultation progress report to OMB by August 1<sup>st</sup> of each year as required by a Presidential Memorandum dated November 5, 2009.<sup>25</sup>

## VI. CONCLUSION

The Office of Air and Radiation takes very seriously its responsibility to strengthen the government-to-government dialogue with tribes regarding proposed actions and/or decisions in a manner intended to secure meaningful and timely tribal input. To that end, OAR will continue to actively solicit feedback from tribes on the effectiveness of our coordination/outreach and consultation activities, both directly from tribes during coordination activities, government-to-government consultations and through our tribal partnership groups.

OAR will periodically update the OAR Handbook on Interacting with Tribal Governments when new information is obtained or when EPA regulations, directives, policies, and guidance pertaining to tribal consultation change.

<sup>24</sup> <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2010/m10-33.pdf>

<sup>25</sup> <http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>

## **VII. APPENDIX**

- 1. OAR Tribal Air Program Contacts**
- 2. OAR Tribal Team**
- 3. OAQPS Tribal Program Contacts**
- 4. OAP Tribal Program Contacts**
- 5. ORIA Tribal Program Contacts**
- 6. OAR Tribal Consultation Advisors**
- 7. Incorporating Tribal Considerations into Tier 1 and 2 Actions under the ADP**
- 8. OAR Effects on Tribes Assessment Form**
- 9. Tribal Coordination and Consultation Strategy– Rulemakings**
- 10. Tribal Coordination and Consultation Strategy – Voluntary Programs**
- 11. Fact Sheets for Tribes (Examples)**
- 12. Tribal Consultation Letter (Examples)**
- 13. Certification Memo from OAR to OITA (Example)**
- 14. Memo Certifying Consultation from OITA to OAR (Example)**
- 15. Rulemaking Preamble Language (Examples)**
- 16. EPA Response Letter to Tribes (Example)**
- 17. Key Terms and Concepts**
- 18. Relevant Tribal and EPA Organizations**



## A-1. OAR TRIBAL AIR PROGRAM CONTACTS

### Office of Air and Radiation (OAR)

**Pat Childers**  
202-564-1082  
childers.pat@epa.gov

### Office of Air Quality Planning and Standards (OAQPS)

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### Office of Atmospheric Programs (OAP)

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### Office of Transportation and Air Quality (OTAQ)

**Rosalva Tapia**  
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### Office of Radiation and Indoor Air (ORIA)

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### Region 1

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### Region 2

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### Region 4

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### Region 5

**Benjamin Giwojna** (Lead MN)  
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### Region 6

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### Region 7

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### Region 8

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### Region 9

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**Sara Bartholomew**  
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### Region 10

**Nancy Helm**  
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## ***A-2. OAR TRIBAL TEAM***

### **Office of Air and Radiation (OAR)**

**Pat Childers, OAR Tribal Program Manager**

202-564-1082

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### **Office of Air Quality Planning and Standards (OAQPS)**

**Laura McKelvey**

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### **Office of Atmospheric Programs (OAP)**

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### **Office of Transportation and Air Quality (OTAQ)**

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### **Office of Radiation and Indoor Air (ORIA)**

**Jed Harrison**

702-784-8218

harrison.jed@epa.gov

### A-3. OAQPS TRIBAL PROGRAM CONTACTS

## OFFICE OF AIR QUALITY PLANNING AND STANDARDS (OAQPS)

#### Overall Tribal Representative

**Laura McKelvey**  
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#### Tribal Consultation Advisor (TCA)

**Toni Colón**  
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### OAQPS TRIBAL TEAM

#### Air Quality Assessment Division (AQAD)

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#### Air Quality Policy Division (AQPD)

**Pam Long**  
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#### Health and Environmental Impacts Division (HEID)

**Vicki Sandiford**  
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#### Sector Policies and Programs Division (SPPD)

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#### Outreach and Information Division (OID)

**Toni Colón**  
(OAQPS Tribal Coordination  
and Consultation)  
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**Adam Baumgart-Getz**  
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**Mark Sendzik**  
(Develops guidance on air quality  
issues of importance to tribes)  
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**Tami Laplante**  
(OAR Tribal Web Contacts and OTS Contact)  
919-541-1915  
laplante.tami@epa.gov

#### ***A-4. OAP TRIBAL PROGRAM CONTACTS***

##### **Office of Atmospheric Programs (OAP)**

**Erika Wilson, OAP Tribal Program Contact**

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wilson.erika@epa.gov

##### **Clean Air Markets Division (CAMD)**

**Erika Wilson**

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##### **Climate Change Division (CCD)**

**Lesley Jantarasami**

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jantarasami.lesley@epa.gov

##### **Climate Protection Partnership Division (CPPD)**

**Julie Rosenberg**

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##### **Stratospheric Protection Division (SPD)**

**Melissa Fiffer**

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## A-5. ORIA TRIBAL PROGRAM CONTACTS

### ORIA Tribal Team Members (January 2013)

<b>ORIA Director</b>	<b>Mike Flynn</b>
<b>ORIA Sr Tribal Advisor</b>	<b>Jed Harrison</b>
<b>Indoor Environments Division</b>	<b>Lou Witt</b>
<b>Radiation Protection Division</b>	<b>Andrea Cherepy</b>
<b>TAMS Center / National Center for Radiation Field Operations (NCRFO)</b>	<b>Farshid Farsi</b>
<b>National Analytical Radiation Environmental Laboratory (NAREL)</b>	<b>Larry Lee</b>
<b>Region 5</b>	<b>Fayette Bright</b>
<b>Region 10</b>	<b>Erin Mader</b>
<b>Lead Region (R3)</b>	<b>Carol Febbo</b> <b>Michelle Moyer</b>

### ORIA Tribal Contacts (January 2013)

<b>ORIA Director's Office</b>	<b>Jed Harrison</b>	<b>702-784-8218</b>
<b>Indoor Environments Division</b>	<b>Lou Witt</b>	<b>202-343-9051</b>
	<b>Chris Griffin</b>	<b>202-343-9421</b>
	<b>Laureen Burton</b>	<b>202-343-9032</b>
<b>Radiation Protection Division</b>	<b>Andrea Cherepy</b>	<b>202-343-9317</b>
<b>TAMS Center</b>	<b>Farshid Farsi</b>	<b>702-784-8263</b>
	<b>Chris Lee</b>	<b>702-784-8278</b>
<b>National Analytical Radiation Environmental Laboratory</b>	<b>Larry Lee</b>	<b>334-270-3451</b>
<b>Region 1</b>	<b>Eugene Benoit</b>	<b>617-918-1639</b>
<b>Region 2</b>	<b>Ameesha Mehta-Sampath</b>	<b>212-637-3719</b>
<b>Region 4</b>	<b>Ana Oquendo</b>	<b>404-562-9781</b>
	<b>Stuart Perry</b>	<b>404-562-8980</b>
	<b>Todd Rinck</b>	<b>404-562-9062</b>
<b>Region 5</b>	<b>Fayette Bright</b>	<b>312-886-6069</b>
<b>Region 6</b>	<b>George Brozowski</b>	<b>214-665-8541</b>
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<b>Region 8</b>	<b>Ron Schiller</b>	<b>303-312-6017</b>
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	<b>Mike Bandrowski</b>	<b>415-947-4194</b>
<b>Region 10</b>	<b>Davis Zhen</b>	<b>206-553-7660</b>
	<b>Erin Mader</b>	<b>206-553-1254</b>

**A-6. OAR TRIBAL CONSULTATION ADVISORS FOR  
TRIBAL CONSULTATION TRACKING SYSTEM (TCOTS)**

**Office of Air and Radiation (OAR)**

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**Office of Air Quality Planning and Standards (OAQPS)**

**Laura McKelvey**

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mckelvey.laura@epa.gov

**Toni Colón**

919-541-0069

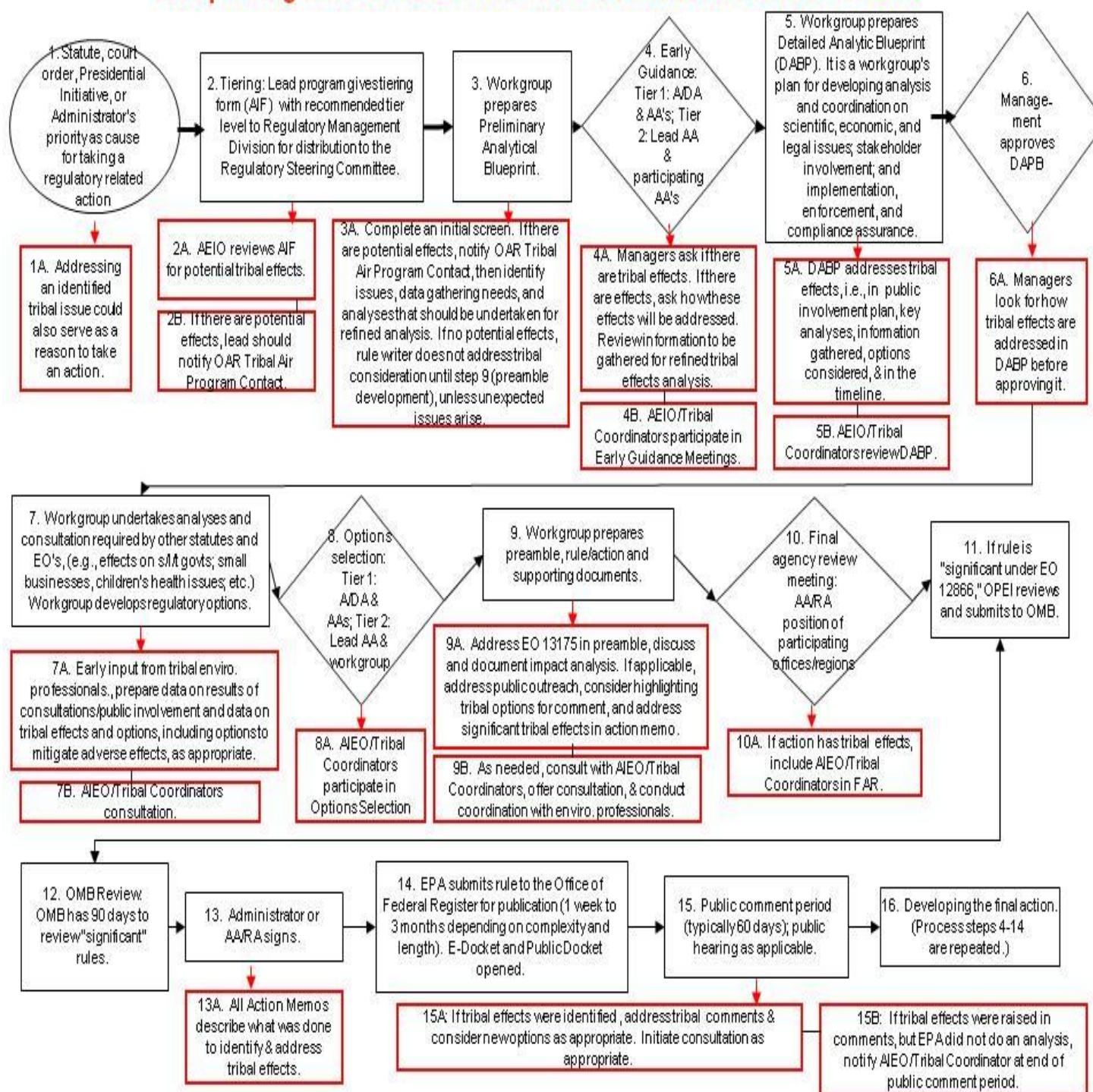
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**Office of Transportation and Air Quality (OTAQ)**

**Rosalva Tapia**

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**A-7. INCORPORATING TRIBAL CONSIDERATIONS INTO TIER 1 AND TIER 2 ACTIONS UNDER THE ADP****Incorporating Tribal Considerations into Tier 1 and 2 Actions under the ADP**

*Boxes Outlined in Red Show When Tribal Considerations Should Be Incorporated Into Process*



**A-8. OAR EFFECTS ON TRIBES ASSESSMENT FORM****OAR EFFECTS ON TRIBES ASSESSMENT FORM****(For OAR Actions and/or Decisions)**☐ OAP   ☐ OAQPS   ☐ ORIA   ☐ OTAQ

Name of Action and/or Decision: \_\_\_\_\_

Project Lead Name &amp; Number: \_\_\_\_\_

Division &amp; Group: \_\_\_\_\_

Tribal Contact: \_\_\_\_\_

Action and/or Decision Stage (e.g., design, data gathering, pre-proposal, proposal, final, other) \_\_\_\_\_

Estimated date of next major action and/or decision (e.g., proposal or final) \_\_\_\_\_

Type of Action and/or Decision: ☐ Regulation   ☐ Policy   ☐ Guidance   ☐ Voluntary Program   ☐ OtherScope of Action: ☐ National   ☐ Regional   ☐ Pilot(s)☐ Sources (number and location) \_\_\_\_\_☐ Pollutants addressed \_\_\_\_\_*To assess whether an action and/or decision may affect tribal interests, please address the following questions. (If the answer is **YES and more space is needed** please explain on an attached sheet.)*☐ Does this action and/or decision establish new federal standards or significant policy or guidance? \_\_\_\_\_☐ Is the planned activity designed with intent to include activities in Indian country? (e.g., training or grants) \_\_\_\_\_☐ Does this action and/or decision negatively affect tribal interests – or is it close enough to potentially affect Indian country, Alaska Native Villages and/or Alaska Native Corporations? \_\_\_\_\_☐ Have any of the tribes (either nationally or through the regions) shown interest in and/or concerns with this rule or voluntary program development or change? \_\_\_\_\_**Specific to regulatory actions:**☐ Does the action and/or decision impose an economic cost upon Indian tribes? \_\_\_\_\_☐ Does the action affect tribal interests (human health, ecological, cultural, economic, and/or social impacts)? \_\_\_\_\_☐ Will this action and/or decision affect tribal treaty resources? \_\_\_\_\_

- ☐ Will it affect trust lands that may be outside a reservation boundary? \_\_\_\_\_
- ☐ Are there localized effects on resources that may be outside a reservation boundary -- but for which a tribe (or tribes) has treaty rights -- such as the ability to take water, hunt, fish, or gather a resource from a certain area? \_\_\_\_\_

☐ Will this action and/or decision affect the relationship (or the distribution of power) between the federal government and Indian tribes? \_\_\_\_\_

- ☐ Example: Will the action and/or decision affect the status of tribes as a co-regulator or the tribe's right to self-governance? \_\_\_\_\_
- ☐ Are there any special legal considerations such as jurisdiction in Indian country? \_\_\_\_\_

*If at least one answer is **YES**, consultation with the potentially affected tribal officials may be warranted along with coordination. If **ALL** answers are **NO**, consultation may not be called for; however, coordination is recommended.**Refer to the OAR Handbook for Interacting with Tribal Governments for more information.  
Please submit completed form to the tribal contact within your program office.*

## **A-9. TRIBAL COORDINATION AND CONSULTATION STRATEGY: RULEMAKINGS**

### **1) Early in Action Development Process (ADP)**

- a. Contact sub-lead EPA region and give brief overview of action on monthly Tribal Air Coordinator (TAC) call.
- b. Meet with tribal environmental professionals (TEPs) on monthly National Tribal Air Association (NTAA)/EPA calls, Regional Tribal Operations Committee (RTOC) or other tribal forum(s) to present key concepts of the action and/or decision and get input on tribal effects.
  1. Work with your tribal program contact(s) to identify appropriate forums.
  2. Your tribal program contact can help you communicate with the tribes and the EPA regional tribal contacts (TACs and other regional staff) as well as develop communication materials that are tribal friendly.

### **2) Prior to Proposal of Action**

- a. Meet with tribal personnel to present the key concepts in the action. (Note: generally this is done with TEP staff, but if there are relevant tribal effects or interest, an opportunity for consultation with elected tribal officials or their authorized representatives should take place.)
  1. If consultation is called for, send letters to tribal leaders and key consortia to provide an opportunity for consultation.
  2. Respond to tribal leaders' request(s) as appropriate.

### **3) After Proposal of Action**

- a. Conduct ongoing outreach to explain the content of the proposal and to encourage input from the tribes on TAC, NTAA calls, RTOC meetings, and other forums. Additional consultation with tribal leaders or their authorized representatives should be conducted as appropriated.
- b. Mechanisms for highlighting the proposal:
  1. Tribal Air Newsletter
  2. Tribal Air Website at <http://www.epa.gov/air/tribal/>
  3. Tribal Listserv

### **4) After Final Action**

- a. Conduct coordination to explain the content of the final rule.
- b. Mechanisms for highlighting the final decision and identifying next steps:
  1. Tribal Air Newsletter
  2. Tribal Air Website at <http://www.epa.gov/air/tribal/>
  3. Tribal Listserv
- c. Follow-up with tribes.



## A-10. TRIBAL COORDINATION AND CONSULTATION STRATEGY: VOLUNTARY PROGRAMS

### OAR's Tribal Strategy for the Office of Indoor Air and Radiation

#### Purpose of Tribal Strategy

Improve effectiveness of ORIA's mission in Indian country through 3 strategic goals:

- Optimize ORIA's radiation and indoor air programs' limited resources more efficiently and effectively.
- Increase collaboration across EPA regional offices and Headquarters.
- Increase responsiveness to tribes.

#### Purpose of Collaboration Strategy

*Primary purpose :* To address goal 3 above, to seek tribal input on priorities, needs, concerns, and to get recommendations.

*Secondary purpose(s):* Make tribes aware of OAR's Tribal Strategy for the Office of Indoor Air and Radiation's efforts and processes.

Manage expectations (no new resources anticipated; only ORIA mission),  
(process used to develop the Strategy and seek tribal comment).

Demonstrate greater tribal emphasis by ORIA.

Initiate /cultivate relationships with tribes.

#### Formal Consultation?

Formal consultation is not envisioned. This is a voluntary effort and can evolve to formal consultation if requested or indicated. We also believe that this effort will be most successful if we can work at the "Tribal Environmental Professional" level rather than with tribal leadership. The tribal environmental professionals are dealing with indoor air and radiation concerns directly, and should be the best source of relevant and constructive input on how ORIA can design its program to be most effective.

#### Collaboration Approach

The approach is based on a successful strategy used by OAQPS for their tribal plan. The overall approach is to work with a subset of tribal professionals to develop a draft or "straw" proposal, OAR Tribal Strategy for the Office of Indoor Air and Radiation, and then seek broad (national) input from all interested tribes on the straw proposal. The Indoor Air and Radiation approach varies slightly initially. For Indoor Air, the plan is to identify a small group (5-8) of tribal professionals with a solid background in operating a Tribal IAQ program. Their input will be used to develop the straw proposal. Ideally, we will have a 2-3 day face to face meeting with the tribal professionals and key EPA staff (including managers). We'll try to take advantage of other tribal meetings to leverage travel resources. To develop the

## A-10. TRIBAL COORDINATION AND CONSULTATION STRATEGY: VOLUNTARY PROGRAMS (continued)

radiation content of the straw, we'll identify individual tribes that are dealing with unique issues (legacy uranium contamination, proximity to a Nuclear Power Plant, potential impact from future/planned mining or extraction activities, impact from a uranium processing facility). Rad listening sessions will be by phone. This initial tribal input will be summarized and included in the straw proposal. The plan is to develop a set of Tribal IAQ and radiation priorities and recommendations to include in the straw proposal (OAQPS example). We plan to seek broad tribal comment on the straw proposal through various means (see Process), revise and finalize the OAR Tribal Strategy for the Office of Indoor Air and Radiation based upon tribal input (as well as EPA input), then move to outreach and implementation of the final plan.

### Collaboration Process & Timeline

Planned Date	Activity	Mechanism	Status / Notes
Aug 2011(ongoing)	Announce ORIA intentions and process to develop the Tribal Strategy	NTAA Call, NTAA email distribution, TAC call, ORIA Regional call, TAMS Steering Committee, ITEP	
Feb 2013	Identify and Invite participants for IAQ and Radiation "straw development " listening sessions		
Feb-Mar 2013	Develop standard questions for the listening sessions		
Mar 2013	Develop agenda and background piece on the tribal strategy for the listening sessions		
Mar-Apr 2013	Conduct initial listening sessions (for Straw")	IAQ - Face to Face in Las Vegas with TAMS meeting. Rad calls	Face to Face cancelled. 2 phone conferences.
May 2013	Complete straw ORIA Tribal Strategy proposal		
May 2013	Develop /complete presentation for NTF		
May 2013	NTF sessions: announce straw proposal, hold info & listening session	Training Session, Eco-Cafe	
May 2013	Announce availability of the straw and interest in comments	NTAA, TAMS SC, OAQPS and ORIA tribal WebPages	
Jun 2013	Schedule, announce webinar listening sessions.	OAQPS email distribution, NTAA Call, NTAA email	Delayed until late Aug/Early Nov

**A-10. TRIBAL COORDINATION AND CONSULTATION STRATEGY: VOLUNTARY PROGRAMS**  
*(continued)*

		distribution, TAC call, ORIA regional call, TAMS steering committee, OAQPS and ORIA tribal web pages	
Jul-Aug 2013	Hold 2 informational webinars / listening Sessions		Held in August and September 2013 #1 = 55 Registered/48 attended #2 = 36 Registered/28attended
Sep 2013	Finalize plan		Delayed to coincide with ORIA Natl. Meeting in Nov 2013
Oct 2013	Conduct outreach on plan	OAQPS email distribution, NTAA Call, NTAA email distribution, TAC call, ORIA regional call, TAMS Steering Committee, OAQPS and ORIA tribal web pages	Nov - ongoing
Oct 2013(ongoing)	Implement plan		Nov - ongoing

***A-11. FACT SHEETS FOR TRIBES (Example)***

1. **Final Mandatory Reporting of Greenhouse Gases Rule**  
<http://www.epa.gov/ghgreporting/documents/pdf/infosheets/tribalguide.pdf>
2. **Hospital/Medical/Infectious Waste Incinerators:** Proposed Amendments to the Federal Plan to Implement Standards of Performance for Existing Facilities and Proposed Amendments to the New Source Performance Standards  
[http://www.epa.gov/ttn/oarpg/t3/fact\\_sheets/himwi\\_prop\\_fs\\_032812.pdf](http://www.epa.gov/ttn/oarpg/t3/fact_sheets/himwi_prop_fs_032812.pdf)
3. **Proposal:** Amendments to Delegation of Authority Provisions in the Prevention of Significant Deterioration (PSD) Program  
<http://www.epa.gov/air/tribal/pdfs/part52factsheet.pdf>

## A-12. TRIBAL CONSULTATION LETTER (Example 1)



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
RESEARCH TRIANGLE PARK, NC 27711

OFFICE OF  
AIR QUALITY PLANNING  
AND STANDARDS

May 31, 2013

Dear Tribal Leader:

On May 23, 2013, the U.S. Environmental Protection Agency proposed amendments to the Tribal Minor New Source Review (NSR) rule. The purpose of this letter is to invite you to consult, should you believe that your tribe could be affected by these amendments.

The EPA is proposing the following amendments:

- Add seven categories of emissions units/activities to the current list of sources exempted from minor source permitting. The existing rule exempts seven categories from permitting that do not emit NSR pollutants or that emit these pollutants in negligible amounts. The seven additional categories that the EPA is proposing to exempt from minor NSR permitting requirements include:
  - Certain emergency generators.
  - Internal combustion engines rated below 50 horsepower.
  - Certain small furnaces or boilers used for space heating.
  - Single-family residences and residential buildings with four or fewer dwelling units.
  - Air conditioning units not associated with industrial processes.
  - Forestry or silvicultural activities.
  - Cooking of food other than wholesale businesses that both cook and sell cooked food.
- Add definitions to clarify construction-related activities. The proposed terms are tailored specifically to address the minor NSR program. The existing rule refers to the major NSR rule definitions. Implementation of the minor NSR rule would be easier if terms are contained within it.
- Reconsider the advance notification period required for true minor sources that have registered with their permitting authority and later relocate. The existing rule requires 30 days notification prior to relocation. The EPA is requesting comment on advance notification periods between 10 and 30 days.

**A-12. TRIBAL CONSULTATION LETTER** *(continued)*

The EPA will accept comment for 60 days after the proposed rule is published in the Federal Register on or about June 15, 2013. We will be available to discuss the proposed revisions, however, if you prefer to initiate government-to-government consultation with the EPA on this rule, please contact Toni Colón at (919) 541-0069, email: [colon.toni@epa.gov](mailto:colon.toni@epa.gov). Please contact us by June 28, 2013 in order to request consultation.

We request your input to assure that we develop the best rule possible. We endeavor to conduct our efforts with sensitivity to the needs and culture of your tribe and with attention to the potential impact of our actions. We look forward to hearing from you.

Sincerely,



Anna Marie Wood  
Director  
Air Quality Policy Division

cc: Tribal Environmental Director  
Tribal Environmental Staff



**A-12. TRIBAL CONSULTATION LETTER (Example 2)**

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
RESEARCH TRIANGLE PARK, NC 27711

OFFICE OF  
AIR QUALITY PLANNING  
AND STANDARDS

November 1, 2013

Dear Tribal Leader:

As part of President Obama's Climate Action Plan, the U.S. Environmental Protection Agency is working expeditiously to complete carbon pollution standards for both new and existing power plants under the Clean Air Act (CAA). Our efforts will need to address the efficiency and performance of power plants that burn fossil fuels such as coal and natural gas. Among the potential outcomes are requirements for greater efficiency from the infrastructure and resources on which your community depends.

Following through on this action under the President's Climate Action Plan, the EPA is proposing performance standards for new power plants that burn fossil fuel. The proposed standards will be published shortly and open for comment. This action, signed on September 20, 2013, is the EPA proposal titled "Greenhouse Gas New Source Performance Standard for Electric Utility Steam Generating Units."

For our effort to address existing sources, the EPA is holding 11 public listening sessions across the country to solicit ideas and input from the public and stakeholders about the best CAA approaches to reduce carbon pollution from existing power plants. The feedback from these 11 public listening sessions will play an important role in helping the EPA develop smart, cost-effective guidelines to reduce carbon pollution from existing power plants that reflect the latest and best information available. The agency will then propose these guidelines and seek public input during the notice and comment period. We anticipate releasing a proposal by June 2014. Also by June 2014, the EPA will propose performance standards for modified and reconstructed power plants. For more information on these listening sessions to address existing plants and to register online, go to: <http://www2.epa.gov/carbon-pollution-standards/public-listening-sessions>. For those who cannot attend these sessions, input can be e-mailed to: [carbonpollutioninput@epa.gov](mailto:carbonpollutioninput@epa.gov). The agency will continue to actively seek and accept input, data, analysis and suggestions through the month of November, and plans to begin drafting the proposal before the end of the year in order to meet the June 2014 proposal deadline called for by the President's Climate Action Plan.

Although we are holding listening sessions broadly and both initiatives will be carried out through notice-and-comment rulemaking, we recognize our responsibility to consult on a government-to-government basis with federally recognized tribes on efforts that may affect tribal



**A-12. TRIBAL CONSULTATION LETTER** *(continued)*

interests. Consultation is a process of meaningful communication and coordination between the EPA and tribal officials prior to the EPA taking actions or implementing decisions that may impact tribes. This letter is a formal invitation for consultation with the EPA on behalf of your tribe and community to discuss the actions that we are preparing with respect to the President's Climate Action Plan. Throughout the development of these actions, the EPA will engage with tribal staff as well as stakeholders from states, local governments, the private sector and non-profit organizations.

To ensure that your lands and interests are duly considered, we are prepared to consult with you or your designee should you desire. If you would like to initiate government-to-government consultation with the EPA on these actions, please contact Matthew Witsoky at (919) 541-2865, email: [witosky.matthew@epa.gov](mailto:witosky.matthew@epa.gov) or Toni Colón at (919) 541-0069, email: [colon.toni@epa.gov](mailto:colon.toni@epa.gov). If you desire government-to-government consultation with the EPA, we kindly request that you notify us by November 26, 2013.

We seek your input to assure that we conduct our efforts with sensitivity to the needs and culture of your tribe and with attention to the potential impact of our actions. We look forward to receiving your feedback.

Sincerely,

/s/

Peter Tsirigotis  
Director

Sector Policies and Programs Division

cc: Tribal Environmental Director  
Tribal Environmental Staff

**A-12. TRIBAL CONSULTATION LETTER (Example 3)**

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
 RESEARCH TRIANGLE PARK, NC 27711

OFFICE OF  
 AIR QUALITY PLANNING  
 AND STANDARDS

August 3, 2011

Dear Tribal Leader:

On July 12, 2011, the U.S. Environmental Protection Agency (EPA) proposed to set additional secondary (welfare) national ambient air quality standards (NAAQS) for oxides of nitrogen and sulfur. These standards provide protection against air pollutants that impact public welfare such as ecosystems, vegetation, and other resources. The purpose of this letter is to invite you to consult on this proposal. EPA is proposing to retain the existing secondary NAAQS for oxides of nitrogen and sulfur. These proposed standards are:

- For NO<sub>2</sub>: 0.053 ppm (parts per million) averaged over one year
- For SO<sub>2</sub>: 0.5 ppm averaged over three hours and not to be exceeded more than once per year

EPA is also proposing to establish an additional set of secondary standards identical to the new health-based primary standards the Agency set in 2010. These standards are:

- For NO<sub>2</sub>: 100 ppb (parts per billion) averaged over one hour
- For SO<sub>2</sub>: 75 ppb averaged over one hour

The proposed rule and accompanying materials, including maps relating to current air quality and deposition of oxides of nitrogen and sulfur in the U.S., are available on EPA's website at <http://www.epa.gov/ttn/naaqs/standards/no2so2sec/index.html>.

EPA has made significant progress in developing a multi-pollutant standard that would address the indirect effects NO<sub>x</sub> and SO<sub>x</sub> have on sensitive ecosystems. While there is strong scientific support for developing this type of standard, EPA does not yet have enough information to set a multi-pollutant standard that adequately protects the diverse ecosystems across the country. EPA is planning a field pilot program to collect and analyze additional data and information that would help inform the next five-year review of the standards for oxides of nitrogen and sulfur.

EPA does not believe the proposed rule will have adverse implications for tribes. By setting the secondary standard equal to the primary standard there are no new implementation or monitoring requirements for states. However, to ensure that your lands and interests are protected, we open the door to consultation and welcome any additional information about the standards or potential impacts you would like to share.

EPA will accept comment for 60 days after the proposed rule is published in the Federal Register on or about August 1<sup>st</sup>. EPA will also hold a public hearing in Washington, DC in late August or early September. We will be available to discuss the proposed revisions in other settings as well, such as the NTAA call on August 25<sup>th</sup>. If you prefer to initiate a formal consultation with EPA on this rule, please contact Angel McCormack at (919) 541-3588, email: [mccormack.angel@epa.gov](mailto:mccormack.angel@epa.gov) or Laura McKelvey at (919) 541-5497, email: [mckelvey.laura@epa.gov](mailto:mckelvey.laura@epa.gov).

***A-12. TRIBAL CONSULTATION LETTER (continued)***

We want your input to assure that we develop the best rules possible. We endeavor to conduct our efforts with sensitivity to the needs and culture of tribes and with attention to the impact of our actions on tribal sovereignty. We look forward to receiving your input.

Sincerely,

A handwritten signature in black ink that reads "Rosalinda M. Rodriguez for". The signature is written in a cursive, flowing style.

Lydia N. Wegman  
Director  
Health and Environmental Impacts Division

cc: Tribal Environmental Director  
Tribal Environmental Staff

### A-13. CERTIFICATION MEMO FROM OAR TO OITA (Example)




UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

**MAY - 4 2011**

OFFICE OF  
AIR AND RADIATION

**MEMORANDUM**

**SUBJECT:** Requesting Concurrence on Consultation Activities per Executive Order 13175 for the Transport Rule

**FROM:** Gina McCarthy   
Assistant Administrator

**TO:** Michelle J. DePass  
Assistant Administrator  
Office of International and Tribal Affairs

This memorandum outlines the tribal consultation and coordination activities that took place related to the Transport Rule by the Office of Air and Radiation's Office of Atmospheric Programs (OAP), Office of Air Quality Planning and Standards (OAQPS), and Office of Policy Analysis and Review (OPAR). Based on the interactions and outreach performed by OAR with tribal representatives, we are requesting your concurrence that we have complied with Executive Order (E.O.) 13175 Consultation and Coordination with Indian Tribal Governments.

The Transport Rule is designed to reduce the transport of air pollution that impairs air quality and harms the health of people living in downwind areas. The proposed rule will help areas in the eastern United States meet existing national air quality standards for ozone and particulate matter by reducing emissions of sulfur dioxide (SO<sub>2</sub>) and nitrogen oxide (NO<sub>x</sub>) from large power plants. The rule is scheduled for final signature by June 30, 2011.

**Consultation and Outreach to Tribal Leaders and Representatives**

Prior to development of the rule, EPA notified tribes of our intent to propose the Transport Rule in the fall of 2009 during a regularly scheduled meeting to update National Tribal Air Association members of upcoming EPA policies and regulations and to receive input from them on the effects of these efforts in Indian country.

During development of the rule, EPA determined that none of the power plants potentially affected by the proposed rule were located on tribal lands. In addition, all areas in the proposed Transport Rule region (31 Eastern states and the District of Columbia) were expected to experience improvements in air quality as a result of the rule. Due to these findings, EPA stated in the proposed rule that the Transport Rule did not have tribal implications.



**A-13. CERTIFICATION MEMO FROM OAR TO OITA (continued)**

In September 2010, during the comment period for the proposed rule, EPA held a webinar for environmental justice communities on the rule. A presentation tailored for an audience of environmental justice community and tribal representatives was specifically designed for this webinar. It was sent to registered participants beforehand and posted on the Transport Rule webpage (<http://epa.gov/airtransport/>). The presentation included information on the context of the rule, plain language information on the rule itself, and directions on how to comment on the rule. The public comment period for the proposed Transport Rule closed on October 1, 2010.

EPA received comments that the Agency did not properly conduct consultation during the proposal phase of the rulemaking process. In response to these comments, EPA sent 583 letters in December 2010 to all federally-recognized tribes in the country offering consultation. In addition, several commenters also noted that the Agency did not adequately consider opportunities for tribes to enter into any of the trading programs and, in particular, did not consider sovereignty issues when addressing how to distribute allowances to potential new units in Indian country. On January 7, 2011, EPA issued a NODA requesting comment on new unit allocations in Indian country, among other topics.

The Agency held a consultation call with three tribes on January 21, 2011. A follow up call was held on February 4, 2011 with two of the three original tribes plus 12 additional tribes and representatives from the National Tribal Air Association. In all, ten tribes participated in these calls as consultation and five participated as information-sharing. EPA considered the additional input from these consultation and information calls, in conjunction with the public comments, in the development of the final rule. Accordingly, EPA has proposed creation of an Indian country new unit set-aside in the final rule to specifically address tribes' concerns regarding the distribution of allowances for new units in Indian country and protection of tribal sovereignty.

After the Transport Rule is promulgated, we intend to conduct similar outreach efforts to tribes, particularly those that participated on the consultation and information calls.

Thank you for your consideration in your concurrence that we have complied with E.O. 13175 Consultation and Coordination with Indian Tribal Governments. If you have questions or need further information, please do not hesitate to contact me or have your staff contact Erika Wilson at (202) 343-9113.

# **A-14. MEMO CERTIFYING CONSULTATION FROM OITA TO OAR (Example)**



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

Office of  
International and  
Tribal Affairs

## **MEMORANDUM**

SUBJECT: Transport Rule: Certification of compliance to E.O. 13175

TO: Gina McCarthy, Assistant Administrator  
Office of Air and Radiation

FROM: *for* Michelle DePass, Assistant Administrator

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (Executive Order), requires that each federal agency provide a meaningful and timely opportunity for consultation concerning the development, administration, and enforcement of regulations that have tribal implications. The Executive Order further stipulates that a designated agency tribal consultation official must certify compliance.

As EPA's designated tribal consultation official, I certify that the Office of Air and Radiation's (OAR) consultation activities for the proposed Transport Rule is compliant with the Executive Order based upon your recitation of consultation activities taken including:

Prior to development of the rule, EPA notified tribes of our intent to propose the Transport Rule through the National Tribal Air Association, a tribal liaison group that EPA established for the purpose of sharing information on and discussing Agency air policies and activities.

EPA held a webinar for environmental justice communities on the rule that included tribal representatives.

In response to tribal comments that EPA received during the public comment phase that the Agency did not properly conduct tribal consultation during the proposal phase of the rulemaking process, EPA sent letters to all federally-recognized tribes offering consultation.

Additionally, in response to comments received from tribes during the public comment phase that the Agency did not adequately consider opportunities for tribes to enter trading programs, EPA issued a NODA requesting comment on new unit allocations in Indian country.

**A-14. MEMO CERTIFYING CONSULTATION FROM OITA TO OAR (continued)**

Following the notification to tribes of the offer to consult, EPA held a consultation call with three interested tribes with a follow up call that included two of the three original tribes, 12 additional tribes, and representatives from the National Tribal Air Association.

EPA considered the additional input from these consultation and information calls, in conjunction with the public comments, in the development of the final rule. Specifically, in response to tribal comments, EPA proposed creation of an Indian country new unit set-aside in the final rule.

Moreover, after the Transport Rule is promulgated, OAR intends to continue conducting outreach efforts to tribes.

The Office of International and Tribal Affairs thanks you for the consultation you have conducted and the additional work with tribes you have planned. We are especially appreciative of the effort to be responsive to tribal concerns that you have shown during the consultation process.



## A-15. RULEMAKING PREAMBLE LANGUAGE (Examples)

### Preamble

Regardless of the effects of a rule, you should summarize your activities in the EO 13175 section of your preamble. In the preamble, discuss and document the impact analysis; address public outreach and consider highlighting tribal options for comments. For rules, refer to the ADP for standard preamble and EO language – note that this standard language may not be suited for all activities.

### If your rule has impacts as defined in the EO 13175 (see below)

*“Subject to EO 13175 (65 FR 67249; November 9, 2000) the EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or the EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement. Executive Order 13175 requires the EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.”*

then, you should use preamble language similar to the following examples:

#### Example 1:

- ☒ has tribal effects
- ☒ imposes substantial direct compliance costs (section 5 (b))
- ☒ requires a certification memo from OAR to OITA

### Mercury and Air Toxics Standards (MATS)

National Emission Standards for Hazardous Air Pollutants From Coal and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units

<http://www.gpo.gov/fdsys/pkg/FR-2012-02-16/pdf/2012-806.pdf> (pages 137,138)

#### F. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

“Subject to EO 13175 (65 FR 67249; November 9, 2000) the EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or the EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement. Executive Order 13175 requires the EPA to develop an accountable process to ensure “meaningful and timely

**A-15. RULEMAKING PREAMBLE LANGUAGE (continued)**

input by tribal officials in the development of regulatory policies that have tribal implications.’’

The EPA has concluded that this action may have tribal implications. The EPA offered consultation with tribal officials early in the regulation development process to permit them an opportunity to have meaningful and timely input. Consultation letters were sent to 584 tribal leaders, provided information regarding the EPA’s development of this rule, and offered consultation. At the request of the tribes, three consultation meetings were held: December 7, 2010, with the Upper Sioux Community of Minnesota; December 13, 2010, with Moapa Band of Paiutes, Forest County Potawatomi, Standing Rock Sioux Tribal Council, and Fond du Lac Band of Chippewa; January 5, 2011, with the Forest County Potawatomi, and a representative from the National Tribal Air Association (NTAA). In these meetings, the EPA presented the authority under the CAA used to develop these rules and an overview of the industry and the industrial processes that have the potential for regulation. Tribes expressed concerns about the impact of EGUs in Indian country. Specifically, they were concerned about potential Hg deposition and the impact on the water resources of the tribes, with particular concern about the impact on subsistence lifestyles for fishing communities, the cultural impact of impaired water quality for ceremonial purposes, and the economic impact on tourism. In light of these concerns, the tribes expressed interest in an expedited implementation of the rule. Other concerns expressed by tribes related to how the Agency would consider variability in setting the standards, and the use of tribal-specific fish consumption data from the tribes in our assessments. They were not supportive of using work practice standards as part of the rule, and asked the Agency to consider going beyond the MACT floor to offer more protection for the tribal communities. In addition to these consultations, the EPA also conducted outreach on this rule through presentations at the National Tribal Forum (NTF) in Milwaukee, WI; phone calls with the NTAA; and a webinar for tribes on the proposed rule. The EPA specifically requested tribal data that could support the appropriate and necessary analyses and the RIA for this rule. In addition, the EPA held individual consultations with the Navajo Nation on October 12, 2011; as well as the Gila River Indian Community, Ak-Chin Indian Community, and the Hopi Nation on October 14, 2011. These tribes expressed concerns about the impact of the rule on the Navajo Generating Station (NGS), the impact on the cost of the water allotted to the tribes from the Central Arizona Project (CAP), the impact on tribal revenues from the coal mining operations (*i.e.*, assumptions about reduced mining if NGS were to retire one or more units), and the impacts on employment of tribal members at both the NGS and the mine. More specific comments can be found in the docket. The EPA will continue to work with these and other potentially affected tribes as this final rule is implemented.’’

**A-15. RULEMAKING PREAMBLE LANGUAGE (continued)****Example 2:**

- ☒ has tribal effects
- ☐ imposes substantial direct compliance costs (section 5 (b))
- ☐ requires a certification memo from OAR to OITA

**Tribal Minor New Source Review (NSR) Rule**

Review of New Sources and  
Modifications in Indian Country

<http://www.gpo.gov/fdsys/pkg/FR-2011-07-01/pdf/2011-14981.pdf> (pg. 40)

*F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

“Subject to the Executive Order 13175 (65 FR 67249, November 9, 2000) EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments or EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

The EPA has concluded that this action does not have tribal implications because it will neither impose substantial direct compliance costs on tribal governments, nor preempt tribal law. This action provides two preconstruction air permitting rules for stationary sources in Indian country, but these rules will neither impose substantial direct compliance costs on tribal governments nor preempt tribal law because these rules will be implemented by EPA or a delegate tribal agency that has requested to assist EPA with administration of the rules, until replaced by an EPA approved tribal implementation plan. Nonetheless, EPA conducted substantial outreach and consultation with tribal officials and other tribal representatives and has incorporated tribal views, throughout the course of developing these rules. See section III.D of this final rule preamble for more details on our tribal outreach and consultation efforts.”

**A-15. RULEMAKING PREAMBLE LANGUAGE (continued)****Example 3:**

- ☐ has tribal effects
- ☐ imposes substantial direct compliance costs (section 5 (b))
- ☐ requires a certification memo from OAR to OITA
- ☒ no tribal effects; certification is not required

**Primary NAAQS for SO<sub>2</sub>****Primary National Ambient Air Quality  
Standard for Sulfur Dioxide**

<http://www.epa.gov/ttn/naaqs/standards/so2/fr/20100622.pdf> (pages 71,72)

*F. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments*

“Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” This final rule does not have tribal implications, as specified in Executive Order 13175. It does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and tribes. The rule does not alter the relationship between the Federal government and tribes as established in the CAA and the TAR. Under section 109 of the CAA, EPA is mandated to establish NAAQS; however, this rule does not infringe existing tribal authorities to regulate air quality under their own programs or under programs submitted to EPA for approval. Furthermore, this rule does not affect the flexibility afforded to tribes in seeking to implement CAA programs consistent with the TAR, nor does it impose any new obligation on tribes to adopt or implement any NAAQS. Finally, as noted in section E (above) on UMRA, this rule does not impose significant costs on tribal governments. Thus, Executive Order 13175 does not apply to this rule.”

## A-16. EPA RESPONSE LETTER TO TRIBE (Example)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

MAY 10 2012

OFFICE OF  
AIR AND RADIATION

The Honorable Gregory Mendoza  
Chairman of the Gila River Indian Community  
P.O. Box 97  
Sacaton, Arizona 85147

Dear Governor Mendoza:

I am writing to thank you for your input on the Mercury and Air Toxics Standards (MATS) for power plants previously referred to as the National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-fired Electric Utility Steam Generating Units (EGUs) (<http://www.epa.gov/mats>).

This letter provides our response to your comments as required under the Agency's consultation policy. As you are aware, the U.S. Environmental Protection Agency offered consultation with tribal officials early in the rule development process to allow for the opportunity to provide meaningful and timely input. On October 25, 2010, letters offering consultation were sent to 584 tribal leaders. The consultation letter provided information regarding EPA's development of rules to reduce toxic air pollution from coal- and oil-fired EGUs. In an effort to inform the tribes of this upcoming rule, the EPA conducted outreach through: presentations at the National Tribal Forum (NTF) in Milwaukee, Wisconsin from June 14 – 16, 2011; monthly National Tribal Air Association calls; and a webinar on the proposed rule for the tribal community on May 5, 2011.

In response to your requests for consultation, we held a series of meetings with you and members of your staff, including an informational meeting on September 16, 2011, in Phoenix, Arizona on both Best Available Retrofit Technology (BART) and MATS; a technical webinar on October 6, 2011, concerning the modeling conducted for the rule; and a face-to-face consultation with you and your staff at the Gila River Indian Community reservation on October 14, 2011.

In these meetings, we heard concerns from you and other tribes about the impact of the rule on the Navajo Generating Station (NGS) and from other tribes that rely on NGS to support their water settlement agreements and other potential impacts. You expressed concerns about the impacts of these rules on the cost of the water allotted to the tribes from the Central Arizona Project (CAP), the impact on tribal revenues from coal mining operations and the impacts on employment of tribal members at both the NGS and the mine. In addition, you and other CAP impacted tribes submitted comments on the Agency's trust responsibility, your concerns regarding the impacts to tribal sovereignty and insufficient consultation on the rulemaking process. Enclosed are the Agency's specific responses to your comments about the impacts of this rule on the NGS; these comments appear in the final MATS rulemaking action.

**A-16. EPA RESPONSE LETTER TO TRIBE (continued)**

The EPA is committed to working with you, NGS and the other involved federal agencies to determine the most appropriate way to implement the MATS and BART rules for NGS in a manner that supports the ongoing needs of your tribe.

Again, thank you for your participation in the development of this rule and I look forward to working with you and other members of your tribes in the future on this and other important matters.

Sincerely,



Janet McCabe  
Principal Deputy Assistant Administrator

Enclosure

cc: Charles L. Franklin  
Akin Gump Strauss Hauer & Feld LLP  
on behalf of Gila River Indian Community



**A-16. EPA RESPONSE LETTER TO TRIBE (continued)****EPA Response to Comments from the Gila River Indian Community  
On the Mercury Air Toxics Standards (MATS) Rule**

**Comment 1: Consultation:** Several tribes expressed concerns with the consultation that took place with their governments as required by Executive Order (E.O.) 13175. You were troubled that we had not undertaken any formal consultation with your tribal community, despite a formal request submitted in July 2011. You believed that given the nature of the interests at stake, the implications of the proposed rule, and the EPA's federal trust obligations, consultation must be among senior-level EPA officials and tribal leaders.

**EPA Response:** We appreciate these comments and recognize the importance of appropriate consultation with tribes in developing this rule, consistent with the federal government's trust responsibility to federally recognized tribes. We agree that this rule affects tribes and we actively encouraged tribes to participate in our rulemaking. We conducted outreach and information sharing with tribal environmental staff through the monthly National Tribal Air Association calls, presentations at the National Tribal Forum, and a webinar, on the content of the proposal, targeting tribal environmental professionals. In addition, we sent letters to all tribal leaders and offered consultation on the rule, prior to proposal and after the proposal, to ensure tribes had the opportunity to participate in the process. As mentioned before, in recognition of concerns raised by several tribes, and in order to help us better understand their concerns, we also participated in a face-to-face meeting with tribes in Arizona who were concerned about the potential impact of this rule on their income and water rights. Following that meeting, we held an additional technical meeting on how Integrated Planning Modeling (IPM) is used in the Regulatory Impact Analysis (RIA) and provided one-on-one consultation with The Navajo Nation, Gila River Indian Community, The Hopi Tribe, and the Ak-Chin Indian Community. Thus, we disagree with your statements that we did not undertake any formal consultation, particularly since senior-level EPA officials were involved in the meetings. We would like to clarify that the generic letter to tribal governments to which one commenter referred to was not intended to be "the consultation" but, rather, it offered consultation.

**Comment 2: Modeling of NGS:** You expressed concern with our presumption in the rulemaking that the Navajo Generating Station (NGS) will close in 2015, citing the RIA where we presumed that two of the three units would retire with or without implementation of the Utility Maximum Achievable Control Technology (MACT) standards and the third would be forced to retire as a result of the economic and regulatory burdens imposed by the proposed rule. You believed these assumptions are in contrast to prior statements by the EPA regarding the facility during the Best Available Retrofit Technology (BART) rulemaking. You also believed we should address the catastrophic impacts that the Utility MACT will have on Arizona tribes and reconcile these opposed positions.

**EPA Response:** In order to address questions about purported conclusions in some of EPA's regulatory documents, EPA held a technical meeting on how the Integrated Planning Modeling (IPM) is used in the Regulatory Impact Analysis (RIA) and how it



**A-16. EPA RESPONSE LETTER TO TRIBE (continued)**

was specifically used in this rulemaking. We pointed out that IPM is used to analyze the power sector's cost-minimizing response to meet electricity demand with MATS in place. The IPM modeling and projections are intended to be a reflection of possible compliance using specific tools, assumptions, and methodologies that the agency believes reflect the best and most current information related to the power sector. But, it is necessarily at a level that cannot reasonably reflect actual compliance decisions, since those will be made individually by the affected industry based on what makes the most sense using existing technologies or other, more cost-effective strategies and considering a variety of other factors specific to the facility. Thus, our IPM analysis of MATS does not dictate what a given facility must do to comply with MATS. Each facility may determine its own compliance strategy to meet the emission rate limits in MATS. There are many specific considerations from NGS that EPA's model would not, and could not, take into account. We will work with NGS and other affected parties to ensure a smooth transition with this rule and address specific issues as they arise. We would point out that changes in the final rule are significant and will reduce costs, increase flexibility and alleviate industry concerns about achievability of standards.

**Comment 3: Different Treatment of NGS in the Rulemaking:** You discussed numerous considerations regarding NGS, suggesting it should be treated differently from other generating units because it is a unique facility with a significant federal purpose. You noted that NGS powers the delivery of water, a trust resource, to fulfill the mandate of eight Congressionally-approved Indian water rights settlements, to Native American communities and provides jobs both directly and through the associated coal mine.

**EPA Response:** As discussed above, we are sensitive to your concerns and intend to work with tribal and other authorities to ensure a smooth transition and address specific issues as they arise. However, we note that section 112 of the CAA imposes specific requirements with respect to the methodology we must use in establishing emission standards for Hazardous Air Pollutants (HAPs), including Mercury emissions from EGUs. You suggested treating NGS differently from other generating facilities, and we interpret this comment at least in part as a request for a subcategory for NGS. Pursuant to CAA section 112(d)(1), we may subcategorize sources based on differences in class, type, or size. In the preamble to the proposed rule, we further explained that any basis for subcategorizing (e.g. class) must be related to an effect on emissions, rather than some difference which does not affect emissions performance. We do not agree that a subcategory based on location on tribal lands is consistent with the statutory authority to subcategorize, and the commenter does not explain why emissions would be different for EGUs located on tribal lands. Absent that showing, it would not be appropriate to subcategorize units even if we believed such a subcategory was consistent with the statute; however, the methodology for determining emission standards under CAA section 112 does not result in requirements that specify the means of complying with standards. Thus, affected sources make their own determination regarding how they will comply with the standards. We believe that flexible and achievable pollution control requirements are promoted in the final rule through inclusion of alternative standards, alternative compliance options, and emissions averaging as a means of demonstrating compliance with the standards for existing EGUs.

## **A-17. KEY TERMS AND CONCEPTS**

### **Authorized Inter-Tribal Organization**

An “authorized inter-tribal organization” is an organization that has been officially designated by the elected or duly-appointed leaders of federally recognized tribal governments to represent them on a particular issue.

### **Consultation**

“Consultation” is a process of meaningful communication between EPA decision-makers and elected or duly appointed tribal leaders (or their authorized representatives) prior to the EPA taking actions or implementing decisions that may affect tribes. Consultation is government-to-government, whereas identification and coordination can be with communities, environmental staff, and others.

### **Federally Recognized Indian Tribe**

A “federally recognized Indian tribe” is an entity that appears on the list of federally recognized tribes published annually by the Bureau of Indian Affairs (BIA), Department of the Interior (DOI). The Federally Recognized Indian Tribe List Act of 1994, which requires publication of this list, defines “[t]he term ‘Indian tribe’ [to] mean any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.” 25 U.S.C. §479a. Inclusion on the list of federally recognized tribes entitles a tribe to special services and benefits. Federal recognition is typically a requirement to be eligible for federal aid or funding.

### **Federal Indian Law**

“Federal Indian Law” refers to the body of law that defines the legal relationship between the United States and the Indian tribes, including federally recognized Alaska Native entities.

### **Federal Indian Trust Responsibility**

The federal government has a “trust responsibility” to federally recognized Indian tribes that arises from treaties, statutes, executive orders, and the historical relations between the United States and Indian tribes. Like other federal agencies, the EPA acts in accordance with the trust responsibility – which generally includes consulting with and considering the interests of tribes – when taking actions that may affect tribes or their resources.

### **Government-to-Government Relationship**

The relationship between federally recognized Indian tribal governments and the federal government is a unique one. Indian tribes possess an inherent sovereignty over their members and territories. Agency officials interact with tribal officials as representatives of their government. The EPA consults – on a government-to-government basis – with federally recognized tribes.

**A-17. KEY TERMS AND CONCEPTS (continued)****Indian Country**

This term, defined by federal statute at 18 U.S.C. § 1151, means: a) all land within the limits of any Indian reservation<sup>26</sup> under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Tribal land issues can be quite complicated; therefore, you should talk to the EPA Regional Indian Program representatives, Regional Counsel, or the Office of General Counsel for more in-depth information.

**Sovereignty**

“Sovereignty” is the authority that a government draws upon to govern. In the United States, tribes retain important aspects of sovereignty and authority over their members and territory.

**Treaties**

Through treaties, Indian nations ceded certain lands and rights to the United States and reserved certain lands (“reservations”) and rights for themselves. In many treaties, tribal governments reserved hunting, fishing, and gathering rights in territories beyond the land that they reserved for occupation.

**Tribal Air Coordinator (TAC)**

Each regional office has a tribal air coordinator that participates in monthly conference calls organized by the sub-lead EPA region for tribal air issues. These regional contacts are familiar with tribal issues specific to the tribes in their region and can serve as a good resource in early planning efforts and follow-up consultation.

**Tribal Authority Rule**

The “Tribal Authority Rule” refers to the EPA regulation that implements the provisions of the Clean Air Act that authorize eligible tribes to implement tribal air quality programs under the Clean Air Act in a manner similar to states.<sup>27</sup>

**Tribal Consultation Advisors**

Tribal Consultation Advisors (TCAs) assist in identifying matters appropriate for consultation and prepare summary information on consultation activities and provide it to AIEO. TCAs receive and provide advice within their respective program offices and regions on what actions and/or decisions may be appropriate for consultation. TCAs also serve as a point-of-contact for the EPA staff, tribal governments, and other parties interested in the consultation and coordination process. TCAs are the in-office subject matter experts to assist staff and management in the implementation of the Policy.

<sup>26</sup> The EPA’s definition of “reservation” encompasses both formal reservations and “informal” reservations, i.e., trust lands set aside for Indian tribes. *See for example* Oklahoma Tax Comm’n v. Sac and Fox Nation, 508 U.S. 114, 123 (1993); 56 Fed. Reg. 64876, 64881 (1991); or 63 Fed. Reg. 7254, 7258 (1998).

<sup>27</sup> The final Tribal Authority Rule was published at 63 Fed. Reg. 7254 (February 12, 1998).

**A-17. KEY TERMS AND CONCEPTS** *(continued)***Tribal Environmental Professional (TEP)**

Tribal Environmental Professionals are employed by the tribal government to work on environmental issues.

**Tribal Governments**

Most tribes have their own governments, which are generally formed to suit the particular tribe's practical, cultural, political, or religious needs. Many tribal government structures combine traditional features with Western forms.

**Tribal Implications**

As defined by Executive Order 13175, "Policies that have tribal implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes."

**Tribal Officials**

"Tribal Officials" for the purpose of this policy means an elected or duly appointed official of Indian tribal governments or their authorized representatives or authorized inter-tribal organizations. The EPA generally recognizes an inter-tribal organization to be authorized to represent a tribal government after receiving confirmation from an elected or duly-appointed tribal leader that the inter-tribal organization is authorized to consult with the Agency on the tribe's behalf. Such confirmation should be provided in writing.

## **A-18. RELEVANT TRIBAL AND EPA ORGANIZATIONS**

### **AIEO – The American Indian Environmental Office**

The AIEO is part of the U.S. EPA. The AIEO, working with its regional components, coordinates the Agency-wide effort to strengthen public health and environmental protection in Indian country and oversees development and implementation of the Agency's Indian Policy and Consultation Policy. [www.epa.gov/tp/](http://www.epa.gov/tp/)

### **BIA – Bureau of Indian Affairs**

The BIA is an agency of the federal government of the United States within the U.S. Department of the Interior. It is responsible for the administration and management of 55,700,000 acres (225,000 km) of land held in trust by the United States for Native Americans in the United States, Native American Tribes and Alaska Natives. [www.bia.gov/](http://www.bia.gov/)

### **CERT – The Council of Energy Resource Tribes**

The Council of Energy Resource Tribes (CERT) was founded by Indian tribes as a distinct resource providing advice and support for tribes in developing and sustaining long-term energy goals. CERT helps tribes attain the confidence needed to chart a new course of development addressing tribal priorities and values while contributing to a more secure energy future for all Americans. [www.certreearth.com/](http://www.certreearth.com/)

### **ITCA – Inter Tribal Council of Arizona**

The Inter Tribal Council of Arizona, Inc. is a non-profit 501(c)(3) corporation that administers over 20 federal, state and private grants and contracts in a variety of areas including health, research, and environmental quality. The membership of ITCA consists of twenty of the federally recognized tribes in Arizona. ITCA coordinates meetings and conferences to facilitate participation of tribal leaders and other tribal staff in the formulation of public policy at all levels. [www.itcaonline.com/](http://www.itcaonline.com/)

### **ITEC – Inter-Tribal Environmental Council**

The ITEC was formed in 1992 by the signing of a Memorandum of Understanding between 20 Oklahoma tribes and the EPA Region 6. Since that time other tribes have joined and the current membership is 43. [www.itecmembers.org/](http://www.itecmembers.org/)

### **ITEP – Institute for Tribal Environmental Professionals**

The ITEP was created in 1992 to act as a catalyst among tribal governments, research and technical resources at Northern Arizona University (NAU), in support of environmental protection of Native American natural resources. ITEP serves tribes through outstanding, culturally-relevant education and training that increase environmental capacity and strengthen sovereignty. [www4.nau.edu/itep/](http://www4.nau.edu/itep/)

### **NCAI – National Congress of American Indians**

Founded in 1944, NCAI is the oldest, largest, and most representative American Indian and Alaska Native organization that serves to develop consensus on national priority issues that impact tribal sovereignty. [www.ncai.org/](http://www.ncai.org/)



***A-18. RELEVANT TRIBAL AND EPA ORGANIZATIONS (continued)*****NTAA – National Tribal Air Association**

Since its founding in 2002, the National Tribal Air Association has been a leading voice for tribal air quality issues, programs, and policies. With seventy (70) principal member tribes, the NTAA's mission is to advance air quality management and policies and programs, consistent with the needs, interests, and unique legal status of American Indian Tribes and Alaskan Natives. Administration of the NTAA is vested in the Executive Committee consisting of ten (10) tribal representatives, one from each of the USEPA Regions (excluding R3, which has no tribes), plus one from Alaska. The officers include the Chairperson, Vice-Chairperson, Secretary and Treasurer. [www.ntatribalair.org/](http://www.ntatribalair.org/)

**NTOC – National Tribal Operations Committee**

The NTOC was established in February 1994 in order to improve communication and build stronger partnerships between the tribes and the EPA. NTOC is comprised of 19 tribal leaders or their environmental program managers (the National Tribal Caucus) and the EPA's Senior Leadership Team, including the Administrator, the Deputy Administrator, and the Agency's Assistant and Regional Administrators. [www.epa.gov/tp/contactinfo/trcaucus.htm](http://www.epa.gov/tp/contactinfo/trcaucus.htm)

**RTOC – Regional Tribal Operations Committee**

The RTOC is the regional counterpart to the National Tribal Operations Committee (NTOC) and does not replace direct tribal-to-EPA relationships. The RTOC recognizes and respects the existing tribal jurisdiction, cultural, political and social continuity of tribes. Federally recognized tribes reside in nine of the agency's 10 regions (Region 3 is the exception). Each of these nine regions has appointed a Regional Indian Coordinator (RIC), and some of the regions have established an Indian program office. Some regions have a formal RTOC comprised of tribes residing within that region. [www.epa.gov/region9/tribal/rtoc/charter.html](http://www.epa.gov/region9/tribal/rtoc/charter.html)

**TAMS – Tribal Air Monitoring Support Center**

The TAMS Center was created in 1999 through a partnership between tribes, the Institute for Tribal Environmental Professionals (ITEP) and the EPA. It is the first technical training center designed specifically to meet the needs of tribes involved in air quality management and offers an array of training and support services to tribal air professionals. [www4.nau.edu/tams/](http://www4.nau.edu/tams/)

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